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Supreme Court of the United States

OCTOBER TERM, 1950

No. 14

EUGENE DENNIS, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, DENIED

RECEIVED AND ENTERED IN THE OFFICE OF THE CLERK OF THE SUPREME COURT, U.S.

RECORDED AND INDEXED MAY 12, 1951

JOINT APPENDIX

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9597

EUGENE DENNIS, Appellant,

UNITED STATES OF AMERICA, Appellee.

Appeal from the District Court of the United States for the
District of Columbia.

United States Court of Appeals
for the District of Columbia

FILED NOV 3 - 1947

James M. McInerney
CLERK

INDEX TO JOINT APPENDIX.

	Page
Notice of Appeal.....	2
Clerk's Statement of Docket Entries.....	3
Indictment.....	3
Plea.....	4
Motion to Dismiss Indictment.....	5
Motion for Inspection of Grand Jury Minutes.....	7
Affidavit of Joseph R. Brodsky.....	8
Exhibit B attached to Affidavit: Excerpt from Congressional Record.....	12
Motion to Take Testimony.....	15
Petition in Support of Motion to Take Testimony	16
Memorandum Opinion.....	19
Motion for Transfer from the District of Columbia..	27
Affidavit of Joseph R. Brodsky.....	27
Testimony and Proceedings.....	33
Motion for Continuance.....	33
Examination for Jurors on Voir Dire.....	46
Opening Statement on Behalf of United States....	106
Opening Statement on Behalf of Defendant.....	110
Witnesses:	
Karl E. Mundt.....	248
Edward Kenneth Nellor.....	241
Robert E. Stripling.....	218
John Parnell Thomas.....	162
Motion for Acquittal.....	264
Opening Statement on Behalf of Defendant.....	270
Witness Vito Marcantonio.....	272
Renewal of Motion for Acquittal.....	287
Discussion on Prayers for Instructions.....	287
Opening Argument to the Jury on Behalf of the United States.....	298
Argument on Behalf of Defendant.....	308
Closing Argument on Behalf of the United States.	325
Charge to the Jury.....	331
Additional Charge to the Jury.....	341
Verdict.....	342
Discussion on Bail.....	343
Requests for Charge to the Jury.....	363
Motion for New Trial.....	369
Motion in Arrest of Judgment.....	371
Stipulation re corrections in Transcript.....	372

Exhibits:	Page
Government Exhibit No. 5.....	373
Government Exhibit No. 6.....	374
Government Exhibit No. 7.....	375
Government Exhibit No. 8-A.....	378
Government Exhibit No. 8-B.....	379
Government Exhibit No. 8-C.....	379
Government Exhibit No. 8-D.....	380
Government Exhibit No. 9.....	380
Government Exhibit No. 10.....	381
Government Exhibit No. 11.....	382
Defendant's Exhibit No. 3.....	383
Defendant's Exhibit No. 5.....	395
Proceedings in U. S. C. A., District of Columbia Cir- cuit.....	408
Opinion, Clark, J.	408
Judgment.....	417
Designation of record.....	418
Clerk's certificate.....	418
Order extending time within which to file petition for certiorari.....	419
Order allowing certiorari.....	419

IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9597.

EUGENE DENNIS, *Appellant*,

v.

UNITED STATES OF AMERICA, *Appellee*.

**Appeal from the District Court of the United States for the
District of Columbia.**

JOINT APPENDIX.

A

Filed 7-8-47

Notice of Appeal

In the District Court of the United States for the
District of Columbia

UNITED STATES OF AMERICA

v.

EUGENE DENNIS, also known as FRANCIS WALDRON

Criminal No. 441-47

Name and address of appellant—Eugene Dennis, 35 East
12th Street, New York, N. Y.

Name and address of appellant's attorney—Joseph R.
Brodsky, Esq., 100 Fifth Avenue, New York 11, N. Y.

Offense—Violation of Section 192 of Title 2, United States
Code.

Concise statement of judgment or order, giving date, and
any sentence—One year's imprisonment and One thou-
sand dollars fine, on July 8th, 1947.

Name of institution where now confined, if not on bail—

I, the above-named appellant, hereby appeal to the United
States Court of Appeals for the District of Columbia from
the above-stated judgment.

Dated—July 8th, 1947

JOSEPH R. BRODSKY
Attorney for Appellant

A true copy

Test:

CHARLES E. STEWART, *Clerk.*

By LILLIAN C. BROWN

Deputy Clerk.

Seal

(United States Court of Appeals for the District of
Columbia Filed July 9 1947 Joseph W. Stewart Clerk)

B

Filed Jul 9 1947

**Form of Clerk's Statement of Docket Entries to be
Forwarded Under Rule IV**

- • • • •
1. Indictment for Vio. 2, U. S. Code 192, (Contempt of House of Representatives filed April 30, 1947
 2. Arraignment May 5, 1947
 3. Plea to indictment—Plea not guilty May 5, 1947
 5. Trial by jury, Jun 23, 1947
 6. Verdict or finding of guilt—Guilty as indicted Jun 26, 1947
 7. Judgment—(with terms of sentence) Sentenced to imprisonment for a period of One Year and \$1000.00 fine (Pine, J.) entered Jul 8, 1947
 8. Notice of appeal filed—Jul 8, 1947

Date July 9, A. D., 1947

Attest: LILLIAN C. BROWN
Deputy Clerk

Seal

N. B.—This statement from the docket entries is intended suitably to identify the case and not as a substitute for the record on appeal, which is to be prepared and certified as provided in rules VII, VIII, and IX.

Indictment.

495

Filed in Open Court April 30 1947

• • • • •

The Grand Jury charges:

Pursuant to Public Law No. 601, Section 121, of the 79th Congress (Ch. 753—2d Session), and House Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, the House of Representatives was empowered to and did create the Committee on Un-American Activities, having duties and powers as set forth in said Public Law.

Eugene Dennis, also known as Francis Waldron, having been duly summoned and served as a witness by the authority of the House of Representatives through its Committee on Un-American Activities, to appear and give testimony before the said Committee at its session within the District of Columbia on April 9, 1947, on matters of inquiry committed to the said Committee by aforesaid Public Law No. 601, Section 121, and aforesaid Resolution 5, and in particular upon that part of said matters of inquiry which concerned the activities in the United States of the Communist Party and its members, and well knowing that he was summoned and served as aforesaid, wilfully failed to appear and give testimony before the said Committee at its session within the District of Columbia on April 9, 1947, and thereby wilfully made default.

GEORGE MORRIS FAY

*Attorney of the United States in
and for the District of Columbia.*

A true bill:

ROBERT C. ORRISON,

Foreman

Plea.

496

May 5, 1947

Come as well the Attorney of the United States, as the defendant in proper person, and by his attorney, Joseph R. Brodsky, Esquire; whereupon the defendant being arraigned upon the indictment; the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attorney the defendant is granted leave within Fifteen (15) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised.

Motion to Dismiss Indictment.

497

Filed May 20 1947

The defendant moves that the indictment be dismissed on the following grounds:

1. House Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, is unconstitutional in that

(a) it purports to create a committee for purposes wholly unrelated to any of the powers expressly conferred upon Congress by the Constitution and has no connection or association with the power of Congress either to legislate, to judge the elections and qualifications of its members, or to impeach;

(b) it purports to create a committee to exercise powers expressly reserved to the people by the Tenth Amendment to the Constitution;

(c) it purports to create a committee exercising powers in violation of the First Amendment;

(d) it sets up no recognizable standards either for the scope of the investigation or for the conduct of the committee and therefore violates the Fifth Amendment of the Constitution.

2. The so-called Committee on Un-American Activities to which the defendant was allegedly summoned, was not in fact a committee of the House of Representatives in that it did not consist exclusively of members of that House but included one John E. Rankin who, although purporting to act as a Representative from the State of Mississippi, was not under Section 2 of the Fourteenth Amendment

498 to the Constitution of the United States and the laws enacted pursuant thereto authorized so to act or to exercise any of the powers or prerogatives of a member of the House of Representatives.

3. Section 192 of Title 2 U. S. C. under which the defendant herein is indicted as construed and applied together with House Resolution 5 creating the so-called Committee on Un-American Activities, does not provide an ascertain-

able standard of guilt and is accordingly violative of the Fifth Amendment to the United States Constitution; the indictment therefore does not state an offense against the United States and is in conflict with the Sixth Amendment.

4. Section 192 of Title 2 U. S. C. under which the defendant is indicted as construed and applied in conjunction with House Resolution 5 and the course of action pursued by the so-called Committee on Un-American Activities constitutes an abridgment of the right of free speech in violation of the First Amendment to the Constitution of the United States and the indictment therefore does not state a proper offense against the United States.

5. Section 192 of Title 2 U. S. C. under which the defendant is indicted as construed and applied in conjunction with House Resolution 5 and the course of action pursued by the so-called Committee on Un-American Activities constitutes a violation of the Fifth Amendment to the Constitution of the United States in that the committee in its conduct and activities has usurped the functions of the Judicial and Executive Branches of the Government.

6. The alleged summoning of the defendant by the so-called Committee on Un-American Activities which is referred to in the indictment herein was not designed or calculated to further a legislative or other proper purpose for which a congressional committee could be constitutionally created.

499 The application of Section 192 to the defendant in this case because of his alleged failure to appear before the so-called Committee on Un-American Activities as set forth in the indictment would constitute a violation of the First Amendment to the Constitution of the United States since it would represent the infliction of a punishment upon the defendant because of his exercise of the rights set forth therein.

8. The defendant was not duly summoned and served as a witness as alleged in the indictment in that

(a) the appearance of the defendant was sought to be obtained by an arbitrary, deceitful, and fraudulent method

and the attempted service of the alleged subpoena was not made in accordance with the laws pertaining to the service of such process and was in violation of the rules of the House of Representatives;

(b) the attempt to serve the said subpoena upon the defendant was made not for the purpose of securing testimony from him but for the purpose of harassing him and causing him annoyance and inconvenience; and the said committee at the very time and place of the alleged service of the subpoena expressly refused to hear any testimony by the defendant with regard to matters then under consideration by the committee, for which very purpose he had voluntarily appeared before the committee and ostensibly been invited by it.

9. The indictment fails to set forth the material allegations necessary to establish the commission of an offense under Section 192, Title 2 U. S. C.

10. The indictment fails to show that the requirements of Section 194, Title 2 U. S. C. have been complied with as a prerequisite to the commencement of the instant prosecution. Dated: May 20 1947.

500

JOSEPH R. BRODSKY
Joseph R. Brodsky
Attorney for Defendant
100 Fifth Avenue
New York 11, N. Y.

Motion for Inspection of Grand Jury Minutes.

528

Filed May 20 1947

The defendant moves for an inspection of the Grand Jury minutes herein as provided for in Rule 6 (e) of the Federal Rules of Criminal Procedure or in the alternative that such minutes be inspected by the Court, and defendant further moves upon such Grand Jury minutes for an order dismissing the indictment pursuant to Rule 12 of said Rules because of the suppression of evidence from

the said Grand Jury affirmatively establishing that defendant did not willfully fail to appear before a Congressional Committee, as charged in said indictment.

The annexed affidavit sets forth the grounds for said motion.

Dated, New York, May 19, 1947.

Joseph R. Brodsky

JOSEPH R. BRODSKY

Attorney for Defendant

Office & P. O. Address

100 Fifth Avenue

New York 11, N. Y.

Affidavit.

529 JOSEPH R. BRODSKY, being duly sworn deposes and says:

I am an attorney at law and the attorney for the defendant and familiar with the facts hereinafter set forth.

Defendant who is the general secretary of the Communist Party of the United States appeared before the House Un-American Activities Committee, at Washington, on March 26, 1947. The Committee at that time was holding public hearings on a number of bills then pending in congress, which had been referred to said committee, the subject matter of these bills being the outlawing of the Communist Party and the imposition of serious disabilities upon its members. Despite the character of this legislation, the committee had first publicly announced that it would not hear any representative of the Communist Party on such legislation. The defendant as general secretary of the Communist Party then made a formal demand upon the Committee for an opportunity to be heard as the representative of the Communist Party, which was so vitally concerned with the proposed legislation. In response to this

530 demand, the Committee ostensibly did grant it and invited the defendant to present the position of his party to the Committee on the said March 26, 1947.

However, when he was sworn by the Committee on that day, he was not permitted to present his views on the legislation. On the contrary, unlike the treatment accorded every other witness who had preceded him over many days of said hearing, he was immediately subjected to questioning about himself and not permitted to set forth his views or the views of the party he represented, for which purpose alone he had been invited by the Committee to attend on that day. Indeed, after a few brief minutes the defendant was ordered removed from the room and just prior thereto the Committee chairman directed its investigator, Mr. Stripling, to serve the defendant with a subpoena which had been prepared and typewritten in advance and which further indicated that he was called before the Committee for the sole purpose of having him served with a subpoena with all the attendant publicity and drama which the Committee craves.

On the return day of the subpoena which was April 9, 1947, the defendant, through an attorney representing him, presented a statement explaining the reasons for his non-attendance. A copy of that statement is hereto annexed and marked Exhibit A. Although that statement was filed with the Committee, the text of it does not appear and is not published in the printed hearings of that Committee, although it is referred to.

531 "Mr. Mundt. Is Mr. Eugene Dennis in the room.
Mr. Lapidus. Mr. Chairman, I am representing Mr. Dennis. I have a communication for the chairman of the committee.

Mr. Lapidus. I am filing the communication on behalf of Mr. Dennis.

Mr. Mundt. Is Mr. Dennis going to appear?

Mr. Lapidus. The statement will explain the situation.

Mr. Stripling. Now, as to the statement which has been filed on behalf of Mr. Dennis by his counsel, I suggest that the committee, if they are to consider the statement, do so in executive session.

Mr. Mundt. Mr. Lapidus, you may retire.

Mr. Lapidus. Yes. Thank you.

Mr. Mundt. I think that probably the committee should consider this statement in executive session and then determine whether or not it is a valid reason for not answering the subpoena and govern its action accordingly."

(See "Hearings before the Committee on Un-American Activities, House of Representatives, 80th Congress, First Session, Public Law 601 (Section 121, Subsection Q (2)) April 9, 1947)

Subsequently, pursuant to the provisions of Section 194 of Title 2 U. S. C., the Committee allegedly reported the circumstances surrounding the incident of this defendant to Congress to accompany a resolution which the committee offered to Congress to have the defendant prosecuted for an alleged contempt of said house. This report appears in the Congressional Record, Volume 93, No. 75, pages 3929-3930 of April 22, 1947.

Although the purpose of Section 194 is that Congress be apprised of all of the facts in order that it may
 532 determine for itself whether a seeming default was willful; the Committee in the aforesaid report failed to present to the Congress the statement of the defendant explaining the reasons for his non-attendance, nor in the debate that followed the introduction of the resolution, was the statement of the defendant read to Congress. Accordingly the resolution was adopted without Congress having knowledge of the facts presented by the defendant, which were deliberately suppressed by the Committee and withheld from its knowledge. A copy of the said report as it appears in the Congressional Record, is annexed hereto as Exhibit B.

Upon information and belief the facts presented to the Grand Jury in the instant prosecution did not include the reasons submitted by the defendant for his non-attendance before the Committee and that these facts were withheld from the Grand Jury just as they had been suppressed and withheld from Congress. Since the indictment found by the Grand Jury charges defendant with *willful* failure to appear, the Grand Jury were entitled to have presented to them the facts available to the Committee as to the reasons advanced by defendant for his non-appearance, so that they, in the performance of their duty could determine whether in their opinion a willful default had occurred.

This motion is therefore made for leave to inspect the Grand Jury minutes, so that the Court may have before it the proof that vital evidence which should have been brought to the attention of the Grand Jury as part and parcel of the evidence that they did receive, was deliberately and in violation of defendant's rights withheld from the Grand Jury.

JOSEPH R. BRODSKY.

Sworn to before me this 19th day of May, 1947.

FAY SIEGARTEL,

Notary Public in the State of New York, Residing in Kings County. King's Co. Clk's No. 1163, Reg. No. 194-S-9. Certificate Filed in N. Y. Co. Clk's No. 1095, Reg. No. 335-S-9. Bronx Co. Clk's No. 96, Reg. No. 256-S-9. Queens Co. Clk's No. 2333, Reg. No. 347-S-9. Certificate Filed in Westchester County. Commission Expires March 30, 1949.

[Exhibit A to this Affidavit is also a part of Defendant's Exhibit No. 5 and is printed under that heading at page 395 of this Appendix.]

Exhibit B Attached to Affidavit.544 1947 *Congressional Record—House* 3929**PROCEEDINGS AGAINST EUGENE DENNIS,
ALSO KNOWN AS FRANCIS WALDRON**

Mr. Thomas of New Jersey. Mr. Speaker, by direction of the Committee on Un-American Activities, I present a privileged report, which I send to the Clerk's desk and ask to have read.

The Speaker. The Clerk will read the report.

The Clerk read as follows:

**REPORT CITING EUGENE DENNIS, ALSO KNOWN AS
FRANCIS WALDRON**

The Committee on Un-American Activity as created and authorized by the House of Representatives through the enactment of Public Law No. 601, section 121, subsection Q (2), caused to be issued a subpoena to Eugene Dennis, also known as Francis Waldron, who is general secretary of the Communist Party of the United States. The said subpoena directed Eugene Dennis, also known as Francis Waldron, to be and appear before the said Committee on Un-American Activities on April 9, 1947, and then and there to testify touching matters of inquiry committed to the said committee; the subpoena being set forth in words and figures as follows:

“By authority of the House of Representatives of the Congress of the United States of America, to Robert E. Stripling: You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, general secretary, Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is chairman, in their chamber in the city of Washington, on the 9th day of April 1947, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart

without leave of said committee. Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States in the city of Washington, this 26th day of March 1947.

"J. PARNELL THOMAS, *Chairman.*

"Attest:

"JOHN ANDREWS, *Clerk.*"

3930 *Congressional Record—House* April 22

545 The said subpoena was duly served, as appears by the return made thereon by Robert E. Stripling, chief investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpoena and who served the said subpoena upon instructions received from the chairman of the Committee on Un-American Activities. The return of the service by the said Robert E. Stripling being endorsed thereon, which is set forth in words and figures as follows:

"Subpena for Eugene Dennis also known as Francis Waldron before the Committee on Un-American Activities, United States House of Representatives, served at 11:35 a. m., March 26, 1947, in the committee's chambers in Washington, D. C.

"ROBERT E. STRIPLING,

*"Chief Investigator,
Committee on Un-American Activities."*

On April 7, 1947, a telegram was sent to Mr. Eugene Dennis, general secretary of the Communist party of the United States, which is set forth herein in words and figures as follows:

April 7, 1947.

MR. EUGENE DENNIS,
*General Secretary,
Headquarters, Communist Party,
50 East Thirteenth Street,
New York, N. Y.*

This is to notify you that in response to the subpoena which was served upon you March 26, you are to appear

before the Committee on Un-American Activities, at the committee's chambers, 225 Old House Office Building, at 10 a. m., April 9, 1947, to then and there give testimony under oath concerning matters pertinent to the committee's inquiry.

ROBERT E. STRIPLING,
*"Chief Investigator,
 Chief Investigator,
 Committee on Un-American Activities."*

The said Eugene Dennis, also known as Francis Waldron, failed to appear before the said Committee on Un-American Activities on April 9, 1947, as directed by the subpoena served upon him on March 26, 1947, and the willful and deliberate refusal of the witness to appear before the Committee on Un-American Activities is a violation of the subpoena served upon him by the Committee on Un-American Activities and places the said Eugene Dennis, also known as Francis Waldron, in contempt of the House of Representatives of the United States.

Mr. THOMAS of New Jersey. Mr. Speaker, I offer a privileged resolution (H. Res. 193) and ask for its immediate consideration.

The Clerk read the resolution, as follows:

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives, as to the willful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron, to appear before the said Committee on Un-American Activities in response to the subpoena served upon him on March 26, 1947, together with all of the facts in connection therewith, under seal of the House of Representatives to the United States attorney for the District of Columbia, to the end that the said Eugene Dennis, also known as Francis Waldron, may be proceeded against in the manner and form provided by law.

Motion to Take Testimony.

546

Filed May 20 1947

* * * * *

The defendant moves the Court to take testimony in aid of the motion to dismiss the indictment herein pursuant to Rule 12 (b) (4) of the Federal Rules of Criminal Procedure and in order to provide substantial justice upon the following grounds:

1. The so-called Committee on Un-American Activities before whom the defendant was allegedly summoned to appear was not and is not as a matter of fact a duly constituted committee of the Congress of the United States; that the purposes and activities of the said Committee are unrelated to any proposed legislative action within the purview of the powers vested by the Constitution in the Congress and its committee; and that the aims and actions of the said Committee are in fact illegal, void and of no effect (Pars. 1 (a) (b) (c) (d); 3, 4, 5, 6, 7 and 9 of the motion to dismiss the indictment).

2. The so-called Committee on Un-American Activities to which the defendant was allegedly summoned was not and is not as a matter of fact a committee of the House of Representatives in that it did not and does not consist exclusively of members of the House of Representatives but included one John E. Rankin who, although purporting to act as a Representative from the State of Mississippi, was not under Section 2 of the Fourteenth Amendment to the Constitution of the United States and the laws enacted pursuant thereto authorized so to act or to exercise any of the powers or prerogatives of a member of the House of Representatives.

547 3. The indictment herein alleges that defendant violated Section 192 of Title 2, United States Code in that he wilfully failed to appear before the Committee on Un-American Activities when as a matter of fact there is not and was not at the time alleged in the indictment a lawfully constituted

Committee on Un-American Activities created by the House of Representatives.

A petition in support of the motion is annexed hereto.

JOSEPH R. BRODSKY,
Attorney for Defendant
 100 Fifth Avenue
 Borough of Manhattan
 New York, New York

Petition in Support of Motion to Take Testimony.

548 Now comes the petitioner, Eugene Dennis, by Joseph R. Brodsky, Esq., his attorney, and alleges upon information and belief:

1. The so-called Committee on Un-American Activities has been and is engaged in an inquiry unrelated to any lawful legislative purpose.

2. The said Committee has been and is illegally usurping the functions of the judicial and executive branches of the Government.

3. The purposes and actions of the said Committee are and have been illegal and completely outside the scope of the powers of any duly authorized legislative committee.

4. The actual purpose of the so-called Committee on un-American Activities is to deprive the American people of the fundamental rights guaranteed to them by the Constitution of the United States and all the activities of the Committee are directed towards that objective.

5. The illegal activities of the said Committee directed to the aforesaid unlawful objective, has been and is, among others:

- 549 a) To establish and build up a black list of names of persons in any way identified with any progressive or liberal organization.
- b) To obtain such aforesaid black list by means of illegal raids, unlawful arrests, illegal searches and seizures, and abuse of process throughout the nation.

- c) To drive out of public employment any American citizen whose name is contained on such black list without regard to competency, qualification or tenure.
- d) To place such black list at the disposal of private employers, to encourage them to discharge persons on such lists from private employment.
- e) To weaken and destroy trade unions by publicizing the names of members and officials of such trade unions taken from such black list.

6. This Committee has asserted that it is no longer performing a legislative function but is, in fact, usurping the functions of the judicial and executive branches of the Government by its public affirmation that it acts and will continue to act as "a grand jury of America."

7. The so-called Committee on Un-American Activities gave comfort and aid to the enemies of the United States during the recent war and acted as a spokesman for the Axis powers in this country and has continued to utilize its forum for the expounding of the doctrines of the defeated enemy.

8. Section 2 of the Fourteenth Amendment to the Constitution of the United States provides:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

550 9. Upon information and belief, at least one-half of the adult male citizens of the State of Mississippi have consistently suffered a denial and abridgment of their

right to vote for the offices referred to in the Fourteenth Amendment. For the Negro people in that State have not been permitted to exercise their right of franchise either in primary or general elections. Even when the law ostensibly granted that right, its exercise has been prevented by State officials or private individuals utilizing any means available for the accomplishment of that end.

10. Upon information and belief, the State of Mississippi has been allowed a total of seven (7) representatives in Congress, apportioned upon the basis of its total population undiminished by the proportion of adult male citizens whose right to vote has been denied or abridged as aforesaid.

11. These facts are directly relevant to a consideration of the sufficiency of the instant indictment. For John E. Rankin, purporting to be a representative from the State of Mississippi, was a member of the so-called Committee on Un-American Activities at the time that that body allegedly summoned the defendant herein. The said John E. Rankin, by virtue of the Fourteenth Amendment and the facts described above, was not under the Constitution authorized to act as a member of Congress. Accordingly, that Committee was not, in fact, a Committee of Congress which must consist exclusively of members thereof, but was rather a group consisting of members and non-members of Congress which could not exercise the powers and prerogatives reserved to those serving in the Legislature pursuant to the Constitution.

12. The defendant is prepared to adduce evidence even beyond that recorded in the hearings of the Senate Committee to Investigate Campaign Expenditures (1946) which examined into the circumstances of the election of Theodore Bilbo to the Senate from the State of Mississippi, which evidence will demonstrate beyond a shadow of doubt that the right to vote of approximately one-half of the adult male citizens of the State of Mississippi was denied
551 or abridged; that at the time of the most recent apportionment of representatives was made to the

State of Mississippi and at all times since that date, Mississippi has had and now has more Congressmen than she is authorized to have under the terms of the Fourteenth Amendment; and that at the time John E. Rankin was purportedly elected to Congress, no seat existed for him in that body under the Constitution.

13. An inquiry into these facts by this Court would be similar in nature to that involved in an allegation that an indictment is invalid because of the systematic exclusion of Negroes from a Grand Jury. In such situations the difficulty of ascertaining the facts or the complexity of the investigation furnish no excuse for failure to uphold the Constitution.

14. Unless the Government concedes the truth of the facts alleged in this petition, it is respectfully requested that this Court conduct a hearing and take testimony with regard to the matters herein alleged.

Dated: May 19th, 1947

JOSEPH R. BRODSKY

Sworn to before me this
19th day of May, 1947.

FAY SIEGARTEL
Fay Siegartel

Notary Public in the State of New York Residing
in Kings County Kings Co. Clk's No. 1163, Reg.
No. 194-S-9 Certificates Filed in N. Y. Co. Clk's
No. 1095. Reg. No. 335-S-9 Bronx Co. Clk's
No. 96. Reg. No. 256-S-9 Queens Co. Clk's No.
2333. Reg. No. 347-S-9 Certificate Filed in
Westchester County Commission Expires March
30, 1949

552

Filed Jun 18 1947

Memorandum Opinion

This cause came on for hearing on defendant's motion to dismiss, motion to take testimony in aid of motion to dis-

miss, and motion to inspect the minutes of the Grand Jury, and the memorandum of the Government in opposition thereto, as well as lengthy argument of counsel.

In substance, the motion to dismiss is reducible to the following points:

1. House Resolution 5 of the 80th Congress is unconstitutional insofar as it continues the House Committee on Un-American Activities.

2. The House Committee on Un-American Activities, before which defendant was summoned to appear, was not a committee of the House of Representatives, in that it did not consist exclusively of members of the House of Representatives, but included one who was not legally a member of the Congress, hence not a proper party to be a member of the Committee.

3. The indictment fails to set forth an offense.

4. Section 192 of Title 2, U. S. C., as construed and applied together with House Resolution No. 5, is violative of the Constitution.

5. The indictment fails to show compliance with Section 194 of Title 2, U. S. C.

553

1.

Counsel for defendant attacks the constitutionality of House Resolution 5, 80th Congress, which continued in effect Rule XI of the House of Representatives as enacted in Public Law 601, 79th Congress, approved August 2, 1946, creating and defining the duties of the House Committee on Un-American Activities. The pertinent paragraphs of that Act provide:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of gov-

ernment as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable."

It is contended that the resolution purports to create a committee to consider matters outside the express powers delegated to the Congress by the Constitution, and that the Congress cannot appoint a committee of inquiry outside the power to legislate, to judge of the elections or qualifications of its members, or to impeach. It is further argued that the resolution purports to create a committee to exercise powers expressly reserved to the people by the Tenth Amendment and in violation of the First Amendment, and that it sets up no recognizable standards either for the scope of the investigation or for the conduct of the committee and therefore violates the Fifth Amendment of the Constitution.

554

Counsel for defendant argues that, as the Constitution contains no reference to Congressional authority to deal with either "propaganda" or "propaganda activities", no such authority exists.

The subject matter of the investigations by the House Committee on Un-American Activities, authorized by Rule XI, namely, "the extent, character, and objects of un-American propaganda activities in the United States," and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution," is comparable to that dealt with by the Foreign Agents Registration Act of 1938, as amended April 29, 1942, which was enacted "to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure by persons engaging in propaganda activities and other activities for or on behalf of

foreign governments, foreign political parties, and other foreign principals so that the Government and the people of the United States may be informed of the identity of such persons and may appraise their statements and actions in the light of their associations and activities." Prosecutions under the Registration Act have been sustained by the Supreme Court. *Viereck v. United States*, 78 U. S. App. D. C. 279; certiorari denied 321 U. S. 794.

It is further contended that "propaganda is speech" and any legislation which might result from the Committee's activities would therefore violate the First Amendment to the Constitution, which guarantees the right of free
555 speech. In support of this position it is stated that the Committee, in more than ten years of existence, has never suggested a single constitutional measure for adoption by the Congress.

Freedom of speech is not absolute. It is significant that defendant's brief concedes that freedom of speech is not without limitation, for he there states, as of necessity he must, "the power of Congress to legislate in the area of speech is severely restricted," and, again, that "present legislation well nigh covers the entire range of possible Constitutional proscription of speech."

The necessity for investigation and inquiry into matters affecting, or which may affect, our government is one of prime importance. In *McGrain v. Daugherty*, 273 U. S. 135, 174, the Court stated:

"We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. . . ."

That no proposed legislation is pending or may result therefrom, is of no concern. The fact, if such be the case, that no legislation has emanated from the Committee in no wise affects its validity. *Townsend v. United States*, 68 App. D. C. 223, 226; certiorari denied, 303 U. S. 664. It might well be that as the result of such investigation or in-

quiry Congress would be so advised as to prevent enactment of detrimental legislation. On occasions Congress desires to look into the advisability of proposed amendments to the Constitution. To take this vital step certainly requires adequate investigation and inquiry.

It is suggested that the possible field within which the Congress could legislate with reference to the subject under inquiry is vested in other committees. The defendant is not in a position to complain of this. Furthermore, the resolution in question specifically provides that the Committee shall report to the Congress. It may well be that, on presentation, such report would be referred to another committee, or to several committees, for consideration and possible action.

Counsel for defendant contends that the resolution violates the Fifth Amendment because it sets up no recognizable standards either for the scope of the investigation of the Committee or for its conduct.

To require such precision in a resolution authorizing a Congressional investigation that a witness could anticipate the exact scope of the investigation could, and probably would, in many instances defeat the purposes intended by the Congress, namely, to investigate to see what legislation, if any, should be enacted, or to obtain information on which to base a determination that no legislation is desirable.

In *United States v. Bryan*, Criminal No. 365-47, Mr. Justice Holtzoff has stated, citing *McGrain v. Daugherty*, supra, that "if it appears that the matter to be investigated is relevant or material to some subject over which the Congress may legislate * * * the power to conduct the investigation exists."

In *re Chapman*, 166 U. S. 661, 670, held that a resolution authorizing a Congressional investigation need not declare in advance what the Congress "meditated doing when the investigation was conducted."

The defendant in this cause is without authority to challenge the validity of the Committee merely by virtue of cer-

tain utterances by it or its members. Relying on such statements, the defendant seeks to anticipate that the
 557 action, if any, by the Committee and, through the Committee, by the Congress would be violative of the Constitution. This he cannot do. The Supreme Court in *Missouri, Kansas, & Texas Ry. Co. v. May*, 194, U. S. 267, 270, said:

“* * * it must be remembered that the legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.”

Again, in *United States v. Lovett*, 328 U. S. 303, 319, Mr. Justice Frankfurter, in his concurring opinion, stated:

“Particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between the Congress and the Court.”

Proceeding from the principle, as aptly stated by Mr. Justice Frankfurter, that “the Court’s duty (is) so to deal with Congressional enactments as to avoid their invalidation unless a road to any other decision is barred,” it follows with greater force that a court should not attempt, by crystal-gazing, to anticipate actions of a Congressional committee and through such medium determine that its acts will be invalid.

Counsel for defendant cites *United States v. Lovett*, supra, as casting doubt on the validity of the Committee on Un-American Activities. The opinion in this case is not applicable to the instant situation. There the Court was passing upon the validity of a legislative provision which it held to be a bill of attainder, in that punishment was inflicted upon certain individuals without a judicial trial. Such is not the situation in the present case.

From a practical viewpoint, the position of the defendant is that he may dictate the terms and conditions under which he will appear before the Committee. This is untenable. To hold otherwise, would be to render the agencies of the Congress, such as committees, impotent.

558 The Court therefore finds that House Resolution 5 and the Committee on Un-American Activities created thereunder are not violative of the Constitution.

Having held the resolution and the committee created thereby to be valid, the first question for determination here is whether or not it was within the power of the Committee to summons the defendant to appear before it. The right of the Committee to require attendance for purposes of appropriate hearing cannot be challenged. *McGrain v. Daugherty*, supra.

2.

Counsel for the defendant asks that, if the Government challenge his representations with reference to the apportionment of representation from the State of Mississippi, the Court set down the matter for submission of proof.

In his discussion of the Fourteenth Amendment, Watson on the Constitution (vol. II, p. 1653) states:

“Congress has never exercised the power conferred upon it by this section of reducing the representation of a State in the House of Representatives, but there can be no question of its power or its right to do so. Of its duty to do so, it alone is the judge. The amendment places the responsibility of enforcing its provisions upon that body.”

The Court holds as a matter of law that it is not its function to pass upon the issue presented by the motion to take testimony in aid of the motion to dismiss, and the motion is therefore denied.

3.

The indictment adequately advises the defendant of the precise nature of the offense with which he is charged, and conforms with the Federal Rules of Criminal Procedure.

559

4.

Counsel for defendant challenges the constitutionality of Section 192 of Title 2, U. S. C., as construed and applied to

gether with House Resolution 5, on the ground that it does not provide an ascertainable standard of guilt. With this the Court does not agree.

In this connection it is important to keep in mind that the specific charge here is a willful failure to respond in answer to a subpoena issued by a Committee of the House, authority for which is specifically found in 2 U. S. C. 192. No difficulty could have been experienced by the defendant in knowing that he was required to appear and to testify to matters of inquiry committed to the Committee, and when he failed to comply, he did so at his own risk.

The statute which the defendant is charged with violating is not and is not claimed by him to be vague and indefinite. Rather, he attacks the resolution creating the Committee, claiming that its terms are not clear to him. His contention is a collateral attack upon a resolution designed to instruct and limit a Congressional committee. As stated by Mr. Justice Holmes in *Nash v. United States*, 229 U. S. 373, even where the accused is under the direct imposition of a criminal statute, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as a jury subsequently estimates it, some matter of degree." This principle is even more applicable where there is under consideration, as here, a resolution of Congress relating to an investigation.

5.

Counsel for defendant attacks the indictment on the ground that it fails to show compliance with Section 194 of Title 2, U. S. C. This is a matter of defense. *In re Chapman*, 166 U. S. 661, 667.

Other questions raised by the motion to dismiss I find to be without merit.

Counsel for the defendant petitioned the Court to ascertain and make use of in connection with this motion matters before the Grand Jury. This petition is denied in that the Court holds as a matter of law that the letter of the defendant to the Chairman of the Committee on Un-American Ac-

tivities dated April 8, 1947, is not a bar to prosecution for failure to attend.

The motion to dismiss, motion to take testimony in aid of motion to dismiss, and motion to inspect the minutes of the Grand Jury are denied.

R. B. KEECH
Associate Justice

June 13, 1947.

561

Filed Jun 23 1947

Motion for Transfer from the District of Columbia

The defendant moves, under Rule 21(a) of the Federal Rules of Criminal Procedure, and upon the basis of the facts set forth in the annexed affidavit of Joseph R. Brodsky, Esq., for a transfer of this case to another District, for the reason that there exists in the District of Columbia where this prosecution is pending, a prejudice so great against the defendant that he cannot obtain a fair and impartial trial in the District of Columbia, and for such other and proper relief as to the Court may seem just and proper.

Joseph R. Brodsky
JOSEPH R. BRODSKY
Attorney for Defendant
100 Fifth Avenue
New York, N. Y.

Dated: June 23, 1947

Affidavit.

562

CITY OF WASHINGTON

District of Columbia, ss:

Joseph R. Brodsky, being duly sworn, deposes and says:

I am the attorney for the defendant in the above entitled matter and am fully familiar with all of the facts and proceedings heretofore had herein. I make this affidavit in

support of defendant's motion to transfer the trial in this case from the District of Columbia to another District.

The District of Columbia is populated largely by employees of the Government of the United States and their families. Almost the entire population is dependant directly or indirectly upon Government employment.

There is in force and effect at the present time, Executive Order 9835 issued by the President on March 12, 1947. Notwithstanding its unconstitutionality and illegality, the fact is that this Order provides for the discharge from Government employment of any person concerning whom there is "reasonable grounds for belief that . . . (he) is disloyal to the Government of the United States." Among the "activities or associations which may be considered in connection with the determination of this loyalty",
 563 the Executive Order includes "sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as . . . Communist."

The defendant, Eugene Dennis, is the general secretary of the Communist Party of the United States. The fact that he is a Communist leader has been widely publicized and is well known to every person who reads the newspapers or listens to the radio in the District of Columbia. Moreover, the indictment states that the reason that the defendant was subpoenaed to appear before the Committee was so that he might be questioned about the activities of the Communist Party of the United States.

The enormous consequences of the Executive Order referred to above make it absolutely impossible to secure a fair and impartial trial in the District of Columbia for a leader of the Communist Party, particularly when the charge against him is laid by the Committee on Un-American Activities. The finding of disloyalty involves not only discharge from employment but a permanent branding as a disloyal and undesirable person, endangering the possibility of earning a livelihood in the future. No individual can be expected lightly to take the risk of incurring such

consequences to himself, his family and his associates. The meaning of "sympathetic association" is undefined in the Executive Order and there is no assurance that it may not be construed by the Attorney General to include a recognition of the rights of a member of the Communist Party. And even if the Attorney General himself would not so construe it, it is impossible to assume that persons selected for jury duty will run the risk of a charge of sympathy with Communism flowing from voting for an acquittal of so prominent a leader of the Communist Party.

564

The importance of this set of facts is particularly clear when it is realized that the members of the House Committee on Un-American Activities from which the charges against the defendant have emanated, have stated openly on the floor of the House of Representatives that they demand a prosecution and conviction of, and the imposition of the maximum punishment on this defendant. They have charged that anything less would open the persons responsible therefor to a charge of disloyalty, and sympathy to Communism. To place the defendant's liberty in the hands of those who have been advised by the Government that anything which does not contribute to the conviction and punishment of this defendant represents a sign of disloyalty and places them in jeopardy of their livelihood and their standing in the community is nothing less than to deny this defendant a trial at all.

It is well known that the House Committee on un-American Activities employs agents to observe and spy upon the activities of Government employees and their associates in order to secure evidence as to whether or not such employees are "sympathetic" to individuals or organizations which the Committee itself associates with Communism or Communists. The Committee has made a public announcement of this policy and went to the point of stating that it would have its agents at a public meeting in the City of Washington which was to be addressed by the former Vice-President of the United States, Henry A. Wallace, in order

to take the names of and to identify those who were present at that meeting on the ground that anyone who was
 565 present and even listening to the former Vice-President of the United States should be considered subversive. If the Washington community has been informed that listening to a former Vice-President of the United States is subversive, they can scarcely be blamed for coming to the conclusion that voting for the acquittal of the general secretary of the Communist Party of the United States falls into the same category.

This Committee has indicated by statements of its members in the House of Representatives that it considers this case to be a test of the authority of Congress and that those who make it possible for Eugene Dennis to go free are flouting the authority of Congress. In view of the enormous power of this Committee and particularly in view of the effect upon the possibility of employment for one labelled by the Committee as disloyal or friendly to Communism, the residents of Washington cannot be expected to frustrate the Committee's insistence upon the conviction of the defendant by voting to acquit him.

The hatred and malice against the defendant in this case which has been engendered by the Committee has been promoted to an enormous extent by the newspapers of Washington. False and malicious reports have been headlined in the Washington press to the effect that thousands of dollars have been offered to secure a postponement of the trial. The Washington press has spread irresponsible rumors designed to create the impression that no Washington attorney would act as counsel for the defendant in this
 case although huge sums of money were offered to
 566 induce them to do so and the newspapers have given as the source of such rumors the Office of the United States Attorney for the District of Columbia.

The total effect of these activities and this propaganda has been to create a lynch atmosphere against the defendant. Recognition of this state of affairs can be found in the publicized statements of some of our most experienced

Washington observers. Thus Thomas L. Stokes writing from Washington in the *Philadelphia Evening Bulletin* for Thursday, June 19, 1947, states:

"It can happen here.

"In our own Capital, seat of a proud democracy and of the most powerful nation today.

"Freedom of speech and assembly challenged. The right to testify in one's own behalf denied. The right of petition denied. Espionage on American citizens gathered at a public meeting. And all at the command of responsible members of our Congress. And all in a disturbing spirit of persecution."

Harold L. Ickes, in a syndicated column in the *New York Post* for June 18, 1947, referring to the House Committee on Un-American Activities, states:

"This Committee has been used to frighten and smear Americans who really believe in the Constitution and who do their honest best to live up to it. It has been used as political black-mail. It has been used to engender fear in the minds of candidates for public office. It has terrorized government employees, more particularly those depending upon the will, too often erratic, of the Congress. Their security and tenure of office can be endangered by the ruthless

567 "exercise of power by an irresponsible witch-hunting committee that has no understanding of the phrase, self-restraint."

Mr. Ickes then makes reference to the meeting sponsored by the Southern Conference for Human Welfare at which Henry A. Wallace was scheduled to speak and points to the effect of the Committee's declaration with regard to the nature of that meeting:

"However, to take their jobs in their hands, and attend, as they have the right to do, a meeting which has been tried and found guilty in advance and without a hearing, would require much more courage than some people could be expected to have."

Certainly these same people could not be expected to have the courage to flout the Committee by voting for the acquittal of a leader of the Communist Party.

Mr. I. F. Stone, in an article entitled, "Is District of Columbia Becoming Police State?" on page 8 of the newspaper *PM*, June 15, 1947, discusses the prevailing attitude in the District of Columbia as follows:

"Government employes—and they make up the larger share of the district's population—are beginning to look over their shoulders, to think twice about whom they invite to their homes, to hesitate before buying any literature or attending any meetings which might be described as radical.

"A combination of the Un-American Activities Committee, the FBI, certain elements in the Dept. of Justice, the prevailing temper of Congress and the *Washington Times-Herald*, largest paper in the district, are—deliberately—creating an atmosphere in which neither justice nor free speech can be assured."

568 To force the defendant to trial in this atmosphere of hatred and antipathy, prejudice and fear is not to give him a fair trial in accordance with established American traditions and the Constitution of the United States, but is to launch him, to borrow a phrase from Justice Holmes, into a "legal lynching."

If it is intended to give the defendant a fair trial, this case must be moved to another District.

JOSEPH R. BRODSKY.

(SEAL.)

Sworn to before me this 23rd day of June, 1947.

Laura V. Montgomery
Notary Public.

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Testimony and Proceedings.

3

PROCEEDINGS.

The Deputy Clerk: The Eugene Dennis case.

Mr. Fihelly: The Government is ready.

The Court: Are you ready, Mr. Brodsky?

Mr. Brodsky: No, I am not.

May I at this point, if the Court please, respectfully request the admittance to this Bar for the purpose of this case as trial counsel Mr. Louis F. McCabe, of Philadelphia, a member of the Bar of the State of Pennsylvania?

The Court: Very well. Your motion is granted. Are you ready?

Mr. Brodsky: Mr. McCabe has a motion to make.

Motion for Continuance.

Mr. McCabe: If Your Honor please, at this time I respectfully make a motion for a general continuance of this case.

I should like to state the reasons for this motion. Eugene Dennis was indicted on a charge of willful default in failing to honor the subpoena of the House Committee on Un-American Affairs. That indictment was, I believe, found during the first week of May of this year.

Promptly thereafter a motion to dismiss the indictment was filed, argument was had promptly, and a decision denying the motion to dismiss was handed down, I believe, on the 14th of this month, nine days afterwards.

4 The case was, I believe, listed for trial on the 16th of this month, at which time Mr. Brodsky, who was counsel who had argued the motions, appeared and stated to the Court that he had in mind to retain trial counsel and therefore requested a continuance. Continuance was granted only until today.

I was first told that my name had been suggested as counsel in this case I think on Wednesday evening last. It happened that I was on trial in the District Court of the United States in Philadelphia in a case which did not come

to a conclusion until Thursday; so that it was not until Friday morning that I was able to direct my attention to this case at all; and when I agreed to accept the case, I called Mr. Fihelly within five minutes and stated that, in my opinion, it would be absolutely impossible, either for myself or any other counsel, however much more capable that counsel would be, to prepare the case for trial at this time.

Mr. Fihelly stated that the case was one of considerable moment and that—I do not recall the words he used. I drew from it that some pressure was being brought to bear, the case was being watched carefully and that, as far as his office was concerned, he would have to insist on trial, one of the reasons being that this would probably be the last opportunity to try a bail case; and I stated that I would come down and press my motion.

Now, if Your Honor please, the motion can be divided into several points.

First of all, I think most important is that by going to trial at this time, in my opinion, my client will be deprived of his constitutional privilege of being represented by counsel. I first saw Mr. Dennis last evening about 10:30, when I came down from Philadelphia, the first I was able to come down.

I talked to him and Mr. Brodsky for some time, but I am frank to say that some of the ideas that they attempted to get over to me are far from clear in my mind. There were a great many matters, both of law and fact, to be digested.

Under our theory of the case, the entire makeup, the activities, of the House Committee on Un-American Affairs would be subject to scrutiny. Certainly, no matter what the rulings would be on the admissibility of that, we would have to have our record in shape, through intelligent proffers of proof.

It would simply be impossible to get that together in a week or two weeks or three weeks.

Now, I understand also that one of the features of this case—that is, the meaning, the legal meaning, of the word

"wilful" in a default case of this sort—is presently the subject of appeal in the case of United States vs. Fields; so that it may be that our position will be upheld or it may be, if the Circuit Court finds against our position, that we will abandon that position. The Circuit Court may convince us we are wrong; so that, in that case, many hours of the Court's time and of ours may be saved.

Now, I do not know the condition of the docket down here. I can only say, from my experience in other courts, it would be amazing if bail cases were tried within six weeks after an indictment and within a week or ten days after the refusal of a vigorously pressed motion to dismiss.

I do not know whether this is the only bail case remaining, so that it would upset the entire business of the United States Attorney in this District if the case went over to the fall. I think that most of us—I hope and trust all of us—will be here in the fall. I can only say that my commitments for this week would require a great deal of readjusting. I have a very important matter for trial on Thursday and another contempt case on Friday. Of course, if we are put to trial, I will simply have to abandon those.

Now, there is one other reason, and I do not know that I should press it now or press it in answer to what my friend will have to say in favor of trying the case immediately. Perhaps, while I am on my feet, I might say it, because that expression has been used with regard to this case—that it is being watched by people, that it has to be tried now.

Of course, Your Honor knows no case has to be tried now. If one of us were taken ill at this time, if Your Honor were taken ill, if the defendant were taken ill, the case could not be tried now, so that I think there is no such physical or moral suasion as that.

I should like next with my motion to call the Court's attention to certain passages in the Congressional Record of Tuesday, April 22, 1947, pages 3931, 3932, and I must confess that I was amazed and disappointed to think that the

Congress of the United States would indulge in such language, which seemed to me to be an attempt to coerce the Attorney General of the United States.

I refer to a passage in which Mr. Smith, Member of Congress from Ohio, asked the Chair:

"Have any of the cases which have been cited for contempt been acted upon by the Justice Department?"

Mr. Mundt said: "Yes; I have just said that they have finally gotten some of the cases started that we recommended nearly a year ago."

"Mr. Smith of Ohio: Has the gentleman reason to believe that the Department of Justice will act upon these cases any more quickly?"

"Mr. Mundt. They are either going to act upon them or they are going to be the object of the greatest campaign of prodding that any Attorney General of this country ever endured."

8 "Mr. Smith of Ohio. Is there any way in which the Attorney General can be forced to act upon these cases?"

"Mr. Mundt. I think that the American public on November 5 forced him into action by their verdict at the polls."

"Mr. Smith of Ohio. Can he not be impeached if he refuses to do that?"

"Mr. Mundt. I think he is too good a politician to refuse to act very much longer, in view of the change of sentiment in America."

"Mr. Smith of Ohio. That does not answer the question. I would like to know if he can be impeached."

"Mr. Mundt. Any Cabinet officer may be impeached."

"Mr. Smith of Ohio. For failing to do his duty?"

"Mr. Mundt. Yes."

"Mr. Smith of Ohio. That is, he has failed to do his duty if he does not prosecute these cases, and the only recourse we have, if he does not act, is to impeach him."

On page 3932, after an interlude which is not pertinent, Mr. Kunkel, of Pennsylvania, said:

"Does the gentleman not think it would have a rather salutary effect if this House should give some thought to impeaching some of these Attorney Generals we have had and do have?"

"Mr. Mundt. Well, I certainly do not object to the House giving thought to that, and I am certainly in favor of doing everything that is necessary to get action out of the
9 Justice Department, which has slept at the switch ever since the advent of the present incumbent in the Attorney General's office, and long before that."

That, I submit to Your Honor, sounds more like the grumbling of the lynch mob in some sections of our country which refused to allow the laws of justice to run their course, which refused to allow time to prepare the defendant's case, which shouts and storms the jail and says, "Take him out and lynch him."

I know what the attitude, I am sure, of Your Honor would be if Your Honor were deluged with a shouting mob outside now, saying, "This case must be continued. This case must be continued. We must have time to try it." Your Honor would very properly, in keeping with the dignity of the bench, say, "I am not going to be influenced by any mob howlings. I am going to decide this case as I see it. I will make up my own mind."

I think the Attorney General's office should, instead of objecting to this motion, in order to tell the mobsters who demand, under threat of impeachment, that this case be tried above all others, that this case, despite the hundreds, I feel safe in saying, of untried cases of similar date——

The Court: You had better get your facts straight. I think the great majority of our cases are tried in this jurisdiction within about four weeks. This case has come
10 on in the regular, orderly way. Continuance was sought a week ago in order to permit counsel to prepare the case, and I granted what I thought was a reasonable and ample opportunity, namely, one week. So do not talk about hundreds of cases.

Mr. McCabe: I think I said I put a reservation in there, Your Honor, because I knew that I was not speaking from the record, and I wanted to save that, because I feel the same as Your Honor said about statements that can't be backed up.

The Court: This case came to me in the regular, orderly way, as one of the cases that should be disposed of in the regular, orderly way. I want to give counsel opportunity to prepare their cases. I feel that I did.

Mr. McCabe: If I had not been on trial all last week, I would certainly be farther advanced in the preparation of the case. I understood that before I was retained or consulted about the case that other counsel had been consulted, but when they found that at least appearance would have to be made here today, they simply threw up their hands and said it was impossible to be here.

I am here saying to Your Honor that I cannot do justice to my client at this time if put on trial at this time. I would ask that the case go over until the fall. If that is not possible, then I would ask for such other time—certainly two or three weeks—which will enable me to digest the mass of information which I must have in order properly to
 11 present the case and also to winnow the chaff from the wheat and thus save my time as well as everybody else's.

This is an expensive proceeding for everybody. I do not think in asking for that time I am overstepping the bounds of even a visitor to this court. I simply say that I am not prepared to go on, and it would certainly take me two or three weeks in order to be prepared, Your Honor. I respectfully urge that the case be continued.

Mr. Fihelly: Your Honor, in the main, the motion which is made this morning by Mr. McCabe is a repetition or a duplication of the motion which was made last week by Mr. Brodsky.

Mr. Brodsky has been in this case from the beginning. There also was associated with Mr. Brodsky and Mr. McCabe, Mr. David M. Freedman, of the New York Bar, who

sits at the end of the table. So you have one attorney who has been in the case since the beginning and two other attorneys who were associated and who are ready, willing, and able to assist Mr. Brodsky.

The Court: Is Mr. Freedman a member of this Bar?

Mr. Freedman: No. I am a member of the New York Bar.

Mr. Brodsky: He has been my associate for some time. He is a member of the Bar in good standing in New York. I would move his admission before the Court for this case.

The Court: Your motion is granted.

Mr. Finelly: As the Court said, practically all of 12 our cases here are tried within four weeks. The average runs that. Nearly 80 per cent of the cases are tried within four weeks. The alleged contempt in this case took place on April 9 of this year. Shortly thereafter the citation came to the United States Attorney. The case was presented speedily and promptly, as it should have been, to the grand jury.

On the date of arraignment before Justice Laws, the case was set for the 16th of June for trial. So that Mr. Brodsky and the defendant knew, from the date of arraignment, that this case was supposed to have been tried a week ago today.

We explained to Your Honor why it could not have been tried a week ago today, because the various motions which had been heard on the 4th and 5th of June were only disposed of late the Friday before, and, like Mr. Brodsky, I did not see the opinion until a week ago Monday morning, so we had no opportunity to send for our witnesses.

Mr. McCabe did call me the other day. There is only one thing that I want to get straight in connection with the conversation had, and I am sorry you misunderstood me. I did tell him that we looked upon it as an important case. I did use the word "pressure," but in an entirely different sense from the way he is using it before the Court.

I said, "Our office looks on it as an important case, the Department of Justice looks on it as an important case, and

I know the gentlemen on the Hill before whom the
 13 contempt took place look on it as an important case.

I do not want you to understand that there is being any pressure put on us, because we all realize the importance of the case."

That is exactly what I said to Mr. McCabe, because there is no pressure put on us.

As I mentioned to Your Honor last week, we have had a rather deluge of these contempt cases during the last few weeks. This is the only one of that group of the recent contempt cases growing out of the investigation conducted by the House Committee on Un-American Activities that has not been tried or is not being tried with the exception of one case, the Josephson case, which happened about the same time on the Hill and, as I explained to Your Honor, that case is set for trial in New York, where there is another indictment for another contempt that took place in connection with the general, same effort to have the appearance of Mr. Josephson before the Committee.

We ask Your Honor that this case go on, as it should go on, in view of the fact that it was set weeks ago for the 16th of June, and Your Honor gave another continuance last Monday to have it tried today.

The Court: "Do you have anything further to say, Mr. McCabe?"

Mr. McCabe: Except this: that despite the fact that
 14 Mr. Brodsky has been associated with this case, and I think he made it known that if the case went to trial he would not be able to try the case, certainly until the ruling of the Court denying the motion to dismiss the indictment, he had no reason to employ trial counsel. That motion to dismiss was made in good faith, with every expectation or every hope, let us say, that it would be upheld. Certainly, up to that time he would not have been justified in putting his client to the expense of retaining trial counsel.

I think a few weeks after that is not too long to grant counsel for the trial of this case. I assure the Court that if

time is granted now for the preparation of this case I will devote myself entirely to the preparation of this case, so that when the case is listed for trial, I shall not come before the Court and say that I have not had time to prepare it.

The Court: Motion for continuance is denied.

I will take a five-minute recess, while the marshal brings the prospective jurors in.

Mr. McCabe: If Your Honor please, I have another motion here, under Rule 21 (a), for a transfer of this case from the District of Columbia, because of prejudice existing in the minds of prospective jurors. I must apologize for the interlineations which I see there, because it was rather hurriedly prepared.

The Court: I will take a five-minute recess in order to give counsel for the Government an opportunity to read the motion and the supporting affidavits.

(A short recess was had.)

The Court: Do you wish to be heard now, Mr. Fihelly? Do you want to wait until Mr. Fay gets in?

Mr. Fihelly: No. He was just in here temporarily. He is not going to stay through the trial.

Mr. McCabe: I think I can add nothing to the affidavit, and if Your Honor has looked at that, I think Your Honor has heard everything I would say orally.

Mr. Fihelly: We are willing to submit it, Your Honor. I wish to say that these same motions were filed in the Eisler case and in the Barsky case being tried before Justice Keech and were disposed of without any lengthy argument.

The Court: You refer to Rule 21 (a)——

Mr. McCabe: Rule 21 (a) of the rules.

The Court: Well, I am not satisfied that there exists in the District of Columbia, where this prosecution is pending, so great a prejudice against the defendant that he cannot obtain a fair and impartial trial. Therefore, your motion is denied.

Mr. McCabe: Your Honor grants me an exception? Your Honor, I am not sure that I made a note of an exception to Your Honor's adverse ruling to my motion for a continuance. I would like to make a note of it now.

16 The Court: Certainly.

Mr. McCabe: Just as a matter of information, Your Honor, the fact that a motion to dismiss the indictment was heard and disposed of by another member of the Court in no way affects this position as a matter of record in this trial, or should I move to make that a matter of record, so as to be subject—

The Court: You may make any motion you like. I will pass on it.

Mr. McCabe: Well, then, I should like to ask Your Honor that the record of the motion to dismiss the indictment and the ruling of the Court thereon be made a portion of this trial record and that an exception thereto be granted.

The Court: Very well.

Mr. McCabe: Thank you.

The Court: Now, it is my practice to interrogate the jury on their voir dire rather than generally and then allow counsel to make reasonable inquiries thereafter, and I will pursue that practice in this case. I find that that is the most expeditious way that I know of to obtain a jury.

After the District Attorney identifies the case, I shall then ask questions of the twelve in the box, and the District Attorney may ask questions, and then, Mr. McCabe, you or your associates may ask questions, only one, however, on a side.

Mr. McCabe: Yes, sir.

The Court: We will proceed that way.

17 Mr. McCabe: Does that permit us to ask questions individually as on voir dire?

The Court: Yes.

Mr. McCabe: Or are we to address our questions to the twelve in the box as a whole?

The Court: Generally to the twelve. If there is any reason, because of the response, which requires further interrogation, you may direct it to that individual.

Mr. McCabe: Thank you.

Mr. Fihelly: Your Honor, to save time, may I make this observation? In the Eisler case and in the Barsky case, which is being now tried before Mr. Justice Keech, both sides had a list of questions prepared either to give to the Court to ask the jury or to ask themselves, but I am pointing out this situation: that all those questions which counsel had ready either to submit to the Court or ask the jury themselves were not permitted by the Court. Many of them were of an inflammatory and improper nature.

I think the list should be submitted first to the Court. We have our list. We will gladly do it. I think the defendant should do the same.

Mr. McCabe: Yes; we have a list.

Mr. Fihelly: Before any harm is done to the panel.

The Court: Well, I generally depend on counsel's observing the proprieties.

18 Mr. Fihelly: I do know in the Barsky case that some 38 questions were submitted to the Court. I do not think a third of them were permitted, and if Your Honor saw them, Your Honor would understand why they were not permitted.

I do think in this case, because of the nature of the questions sought to have permission to ask them, that the Court should rule on them before any damage is done by counsel's asking them. You have heard statements made here and a statement in the affidavit with respect to this committee. Certainly Your Honor would not permit questions of that kind and in that tone to be asked of the jury.

The Court: If you have the questions, I will be glad to look them over.

Mr. Fihelly: I have mine. I will be glad to submit them.

Mr. McCabe: I have a list of questions. It looks rather extensive, Your Honor.

The Court: I will take up the Government's questions first.

Is there any objection to the Government's questions, Mr. McCabe?

Mr. McCabe: I see no objections, Your Honor. I have my own opinions of them, but, as far as a legal objection is concerned, as questions being put to prospective jurors in the trial of this case, I do not see that they are
19 objectionable.

Mr. Fihelly: I think all of them were permitted by Judge Holtzoff in the Eisler case.

The Court: Are there any objections to the defendant's questions?

Mr. Fihelly: I was just handed a copy of them, Your Honor. I have not had a chance to read them.

Mr. McCabe: I think I should say we are trying a defendant named Eugene Dennis. We are not trying anyone else who was tried before Judge Holtzoff or anyone else.

The Court: I realize that.

I think there ought to be searching inquiries to make certain that this defendant receives a fair and impartial trial. I am disposed to allow them.

Mr. Fihelly: Certainly 55 is an improper question, Your Honor.

The Court: Is that the one you object to?

Mr. Fihelly: Yes, Your Honor.

The Court: Any other?

Mr. Fihelly: That is all I see at the moment, Your Honor.

The Court: I will hear you on that, Mr. Fihelly.

Mr. Fihelly: The question takes for granted that there is a hostility by members of the committee toward the defendant. There is nothing before the Court to
20 show that. There is no evidence to back it up. That is the very type of question that I was afraid might poison the minds of the prospective jurors, Your Honor.

The Court: Don't you think, Mr. McCabe, that that position is well taken and that you might amend it to change the word "hostility" to "attitude"?

Mr. McCabe: Well, I think "hostility" is a very mild word, Your Honor, in view of the public statements by members of the committee that they hoped to see Mr. Dennis in the penitentiary and that they feel that the penalty provided by law is too small for his offenses and they are proposing legislation to increase the time in jail to five years.

The Court: I do not think that that is relevant.

Mr. McCabe: I think it might be relevant in enabling me judiciously to exercise my peremptory challenge. I would agree that that would not be ground for a challenge for cause, but I think it is a bit of information that I am entitled to have.

The Court: Would you have any objection to amending it as follows: "Is any member of the panel unaware of the attitude of the House Committee," and so forth?

Mr. McCabe: May I inquire about that?

Mr. Brodsky is looking for a middle word between "attitude" and "hostility." Perhaps "opposition" would take care of it, or the fact that the House Committee has
21 criticized Mr. Dennis' attitude.

The Court: Would you have any objection to having it amended that way?

Mr. Fihelly: I have no objection to "attitude" or to the action taken by the committee pursuant to the defendant's non-appearance—anything like that.

The Court: I will permit it, then, if you wish to submit it as amended.

Mr. McCabe: I will accept Your Honor's suggestion.

The Court: Very well.

That concludes the suggested questions, and, gentlemen, I understand that perhaps some of these questions may invite further interrogation, and I will expect you to use all due propriety in further interrogating prospective jurors.

I will return the questions. I will ask a few general questions and then allow counsel to pursue these questions.

Mr. McCabe: I have an extra copy, if Your Honor wishes to follow that.

The Court: Very well, then. I will keep that.

Now, if you will bring the jury in, Mr. Marshal.

I will ask all spectators and witnesses to take seats to my right, so far as they can, so that the prospective jurors may have a chance to sit down.

The Clerk tells me that one prospective juror, Garvin E.

Peterson, has sent word that he is a traveling man
22 and has engagements to leave the city tomorrow and
is fearful that this case might extend beyond to-
morrow and wants me to excuse him.

Is there any objection to my excusing him?

Mr. McCabe: No objection, Your Honor.

Mr. Fihelly: No objection, Your Honor.

The Court: Mr. Clerk, will you tell Mr. Peterson that he
is excused?

23 Examination of Jurors on Voir Dire.

The Court: Now, Mr. Clerk, swear the jury on the voir
dire.

(Thereupon the jury was sworn on the voir dire by the
Deputy Clerk of the Court.)

The Court: Call twelve, Mr. Clerk.

(Thereupon the following named jurors took seats in the
jury box:)

- | | |
|--------------------------|---------------------------|
| 1. Aristide L. Borelli. | 7. Mrs. Elizabeth Morton |
| 2. Paul B. Burke. | Gingrich. |
| 3. Mrs. Annie Johnson | 8. Stanley D. Grant. |
| Darby. | 9. Mrs. Amanda E. |
| 4. Andrew M. David. | Grigsby. |
| 5. Clinton M. Evans. | 10. Mrs. Bessie M. Groce. |
| 6. Mrs. Nancy Pennintgon | 11. Leroy Harris. |
| Furrow. | 12. Arthur Hirsh. |

The Court: Now, I wish the prospective jurors seated
in the jury box and the other prospective jurors in the
courtroom would listen attentively while the District At-
torney identifies the case. So that it will not be necessary

for him to repeat his identification. Also listen attentively to the questions propounded to the jurors seated in the box because it may be, as the case progresses, that you will be called upon to answer the same questions.

Now, when the questions are asked of the twelve seated in the box, or such substitutes that may be made, the Court will expect each juror to answer, speak up, stand up
24 and answer if the answer to any question is in the affirmative. Otherwise, remain seated and do not speak out. If the answer to any question is in the affirmative, the Court will expect the juror to stand up. If the juror does not stand up and speak up, the Court will understand that his answer is in the negative.

Now, Mr. District Attorney, will you identify the case?

Mr. Fihelly: May it please Your Honor and your prospective jurors: The defendant in this case is Eugene Dennis, who is seated right next to one of his counsel, Mr. McCabe, and Mr. Brodsky, and also associated as counsel for the defendant is Mr. Freedman.

Mr. Freedman and Mr. Brodsky are members of the New York Bar, and Mr. McCabe of the Philadelphia and Pennsylvania Bar.

My name is John W. Fihelly, and I am an Assistant United States Attorney prosecuting the case for the Government.

The defendant is charged with violation of Title 2, Section 192, of the United States Code. He is charged with having been guilty of contempt of the House of Representatives. The indictment states in detail that on April 9th, of this year, after he had been previously summoned by a committee of the House of Representatives, known as the Committee on Un-American Activities, to be present and give testimony before that committee on that date, and that he made wilful default.

The Government expects to call in support of the
25 case all or some of the following witnesses: First, Congressman John Parnell Thomas, of New Jersey. He is the gentleman standing by the wall; Congressman

Karl Mundt. Congressman Mundt is expected to be here. And also Robert Stripling, chief investigator of the House Un-American Activities Committee. Also Mr. Edward K. Nellor.

We may also have to call Mr. Lawrence LeCharity, the reporter who took both the hearing of March 26th and the April 9th hearing in connection with the committee meeting. He is with the Washington Reporters Service, 305 Ninth Street, Northwest. I think that generally outlines the case, Your Honor.

The Court: I will ask whether any prospective juror now seated in the jury box knows the defendant?

(There was no response.)

The Court: Does any prospective juror now seated in the jury box know his counsel, Mr. McCabe, Mr. Brodsky, or Mr. Freedman?

(There was no response.)

The Court: Does any prospective juror know Mr. Fihelly, Assistant District Attorney, who is assigned to prosecute this case?

(There was no response.)

The Court: Does any prospective juror know the District Attorney, Mr. Fay, seated beside Mr. Fihelly, who may participate in the case—do I understand that, Mr. Fihelly?

Mr. Fihelly: He may. As I understand it, he will not be here all the time and with the Court's permission may be in and out.

The Court: All right.

Mr. Fay: Thank you, Your Honor.

The Court: Does any prospective juror now seated in the box know any member of the District Attorney's office staff?

(There was no response.)

The Court: Has any prospective juror read anything about this case in the newspapers?

Juror Furlow: I have, yes.

The Court: Would what you have read influence your judgment in any way?

Juror Furlow: No.

The Court: Could you try this case if selected as a juror and render a fair and impartial verdict based solely on the evidence and on the instructions as to the law given you by the Court?

Juror Furlow: Yes.

The Court: You would be uninfluenced by anything you read in the newspaper?

Juror Furlow: Yes.

The Court: Has any prospective juror formed any opinion as to the guilt or innocence of the defendant?

27 (There was no response.)

The Court: You may inquire, Mr. Fihelly.

Mr. Fihelly: Should the questions be directed to the entire panel?

The Court: To the panel.

Mr. Fihelly: I address myself to the twelve in the box to ask: Has any juror or any member of the family of any juror, or any close friend of any juror, ever been a member of any of the following organizations:

One, the Communist Party; two, the Young Communists League; three, the American Youth for Democracy; four, the Washington Book Shop; five, the Joint Anti-Fascist Refugee Committee; sixth, National Council of American-Soviet Friendship; seven, American Russian Institute; eighth, American Committee for the Protection of the Foreign Born; nine, Free Germany Movement; ten, Southern Conference for Human Welfare; eleven, Civil Rights Congress?

(There was no response.)

Mr. Fihelly: Has any juror subscribed to or read publications known as the "Daily Worker" or "New Masses"?

(There was no response.)

The Court: You may inquire, Mr. McCabe.

Mr. McCabe: Does any member of the panel know any of the members of the House Committee on Un-American Activities?

(There was no response.)

28 **Mr. McCabe:** That is the committee of the House of Representatives which initiated these proceedings?

(There was no response.)

Mr. McCabe: Does anyone now on the panel know any employee of the House Committee on Un-American Activities?

(There was no response.)

Mr. McCabe: Do any now on the panel know any members of Congress?

(There was no response.)

Mr. McCabe: Are any of you employed now or have you been at any time employed by any member of Congress?

(There was no response.)

Mr. McCabe: Is any member of the panel related to or friendly with a person employed now or before this time by the House Committee on Un-American Activities?

(There was no response.)

Mr. McCabe: Is any member of the panel friendly with a person employed now by the Congress, employed by a Congressman or by the Congress?

Juror Furlow: I know someone employed by the Congressman from Indiana.

Mr. McCabe: Would your association with such person have any effect upon your deliberations in this case, if you are selected as a juror?

Juror Furlow: No.

29 **Mr. McCabe:** In other words, you would listen to the testimony and listen to His Honor's charge, particularly as to the presumptions of innocence and weight

of the evidence, and make up your own mind without any opinion because of this?

Juror Furlow: Yes.

Mr. McCabe: I will ask you this question: Is any member of the panel related to or friendly to any employee of the Department of Justice?

(There was no response.)

Mr. McCabe: Is any member of the panel friendly with or associated, related or associated with any person who is now or ever has been associated with the Federal Bureau of Investigation?

(There was no response.)

Mr. McCabe: Has any member of the panel been employed by or is now employed by the Government of the United States?

(Several jurors indicated in the affirmative.)

The Court: Let us start out with number 1.

Mr. McCabe: I note Mr. Borelli is listed as a Government employee.

Is that incorrect, Mr. Borelli?

Juror Borelli: That is correct.

Mr. McCabe: So the question was: Is there anyone an employee of the Government?

Juror Borelli: I didn't get the question. I didn't
30 hear. I can't hear you. I work for the Government.

Mr. McCabe: Mr. Borelli, may I ask you whether you have any difficulty in hearing us or in understanding what is said?

Juror Borelli: No. You asked me—I didn't understand it, but I have got no difficulty at all.

Mr. McCabe: In what branch of the Government are you employed?

Juror Borelli: Federal Works Agency, Building Branch.

Mr. McCabe: You have been employed by that branch, how long?

Juror Borelli: Since 1938.

Mr. McCabe: You are a resident of the District of Columbia?

Juror Borelli: That is right.

Mr. McCabe: By the way, do you have a vote in the District of Columbia?

Juror Borelli: A vote?

Mr. McCabe: Yes.

Juror Borelli: We don't vote in the District of Columbia.

Mr. McCabe: Would your employment by the Government make you influenced in any way to the Government's side of the case as against the defendant?

Juror Borelli: No, sir.

Mr. McCabe: Would this defendant because of the
31 fact that he is to have as witnesses against him leading officials of the United States Government and members of Congress, would he stand in a worse position than some other defendant who didn't have those witnesses appearing against him? Do you understand what I mean, Mr. Borelli?

Juror Borelli: I have answered you already.

Mr. McCabe: It would have no effect on your deliberations?

Juror Borelli: That is right.

Mr. McCabe: Suppose we ask next, Mrs. Darby.

Juror Darby: I used to work for the Government.

Mr. McCabe: How long ago? In what department?

Juror Darby: Apprentice assistant at the Bureau of Engraving.

Mr. McCabe: What is your occupation now?

Juror Darby: Housewife, now.

Mr. McCabe: Would your Government association affect your deliberations in any way?

Juror Darby: No, sir, it would not.

Mr. McCabe: If selected as a juror?

Juror Darby: No, it would not.

Mr. McCabe: Would you be prejudiced against this defendant because of the fact that some of the witnesses

against him would be members of the Congress of the United States?

Juror Darby: No.

32 Mr. McCabe: You would go into the box with a mind free and clear of any prejudice?

Juror Darby: Yes.

Mr. McCabe: Thank you.

Mr. David, where do you work?

Juror David: I am with the Federal Works Agency, mechanic.

Mr. McCabe: How long have you been with them?

Juror David: Since 1940.

Mr. McCabe: Have you ever had any contact with the FBI or any other bureau of the Government?

Juror David: No.

Mr. McCabe: Would your Government service make you inclined toward the Government's side of the case?

Juror David: No, sir.

Mr. McCabe: Do you believe that, for instance, if you were selected as a juror and you came to the conclusion that a verdict of not guilty was required, do you think that would embarrass you in your employment?

Juror David: Of course not.

Mr. McCabe: You don't think you might be called upon to explain in any way?

Juror David: No, sir.

Mr. McCabe: You are aware of the fact that just now there is an examination being made under Presidential Order concerning the loyalty of Government employees?

33

Juror David: Yes, sir, I have read about it.

Mr. McCabe: Do you think that would in any way in considering the evidence in the case, you might say to yourself: Well, now, maybe I better say to myself, maybe if I join others in finding a verdict of not guilty that the FBI is coming down to ask me how I did that?

Juror David: No, sir, I don't think that would happen.

Mr. McCabe: You would listen to the evidence and the charge of His Honor?

Juror David: Exactly.

Mr. McCabe: And the argument of counsel and render a verdict on the evidence which you heard from the stand and the law on the evidence?

Juror David: Yes.

Mr. McCabe: Even if, and His Honor will tell you, if you haven't already heard, that the verdict of the jury must be unanimous and that both the Government and the defendant are entitled to the carefully considered opinion and verdict of each juror?

Juror David: Yes.

Mr. McCabe: Now, suppose it came to the point where you found yourself in a minority, and even after listening to the arguments of your fellow jurors, you were still convinced in your own mind that you were right, if you were
34 still not convinced beyond, as His Honor will describe, beyond a reasonable doubt of the guilt of the defendant, would you then maintain your own position after giving full weight?

Juror David: I think so.

Mr. McCabe: Mrs. Furlow, you are employed where?

Juror Furlow: I am employed by the Bureau of the Census.

Mr. McCabe: How long?

Juror Furlow: Five years.

Mr. McCabe: I don't want to repeat all the questions I went to in detail with Mr. David. There is no point repeating to each juror, but do you feel that your Government employment would embarrass you in any way or deter you from rendering a verdict of not guilty, if you concluded that such a verdict was warranted?

Juror Furlow: I don't think so.

Mr. McCabe: You don't feel you would be embarrassed among your fellow employees?

Juror Furlow: No.

Mr. McCabe: Because of the loyalty test that is going on?

Juror Furlow: I don't think so.

The Court: Do you have any doubt about it?

Juror Furlow: No, it would not influence me. It would not embarrass me.

35 Mr. McCabe: Thank you.

Mr. Grant, where are you employed?

Juror Grant: The City Post Office.

Mr. McCabe: How long have you been employed there?

Juror Grant: For about 29 years.

Mr. McCabe: What district in the city are you? Are you out in the street or in the office?

Juror Grant: Out on the street, a letter carrier.

Mr. McCabe: Does your delivery route bring you in contact with any officials of the Government?

Juror Grant: Not that I know of.

Mr. McCabe: What district are you in?

Juror Grant: The Georgetown district.

Mr. McCabe: Is that a residential district?

Juror Grant: Yes; a few Government buildings, but I don't have to contact anyone.

Mr. McCabe: Do you feel that you would be embarrassed in the consideration of this case at the prospect of returning a verdict of not guilty?

Juror Grant: I do not.

Mr. McCabe: You would listen to the evidence?

Juror Grant: Yes.

Mr. McCabe: And give heed to what His Honor would say regarding the presumption of innocence?

Juror Grant: I would.

36 Mr. McCabe: And the doctrine of reasonable doubt?

Juror Grant: Yes.

Mr. McCabe: Do you feel this loyalty test would in any way render you subject to an inquiry if you found a verdict of not guilty in this case?

Juror Grant: It would not.

Mr. McCabe: Thank you, Mr. Grant.

Mrs. Grigsby. Now, Mrs. Grigsby, you are a card punch operator in the Navy Department?

Juror Grigsby: Yes, sir.

Mr. McCabe: How long have you been employed there?

Juror Grigsby: About four and a half years.

Mr. McCabe: Now, did your work in the Navy bring you in contact in any way with the Intelligence Department of the Navy?

Juror Grigsby: Oh, no.

Mr. McCabe: What branch of the Navy are you in?

Juror Grigsby: Supplies and Accounts.

Mr. McCabe: Do you feel that if you, after considering the case, found that a verdict of not guilty was called for in the case, do you think that would embarrass you among your fellow employees when you went back among them after finishing your service on the jury?

Juror Grigsby: Definitely not.

Mr. McCabe: You would have no hesitation to use
37 your own good judgment and common sense in this case?

Juror Grigsby: No.

Mr. McCabe: Do you feel this loyalty test would in any way affect you?

Juror Grigsby: No.

Mr. McCabe: Mrs. Groce, is that?

Juror Groce: Yes.

Mr. McCabe: Mrs. Groce, you are in the Veterans Administration?

Juror Groce: Yes, sir.

Mr. McCabe: And you are an elevator operator?

Juror Groce: Yes.

Mr. McCabe: How long have you been employed on that job?

Juror Groce: Five years.

Mr. McCabe: Were you with other Government services before that?

Juror Groce: No.

Mr. McCabe: Now, do you feel that you would be embarrassed in any way or influenced in any way in the consideration of this case by the fact of your Government employment?

Juror Groce: No, sir.

Mr. McCabe: Do you think you would be embarrassed among your fellow employees?

38 Juror Groce: No.

Mr. McCabe: And they said: This is one of the jurors that freed Eugene Dennis? You don't think that would bother you at all?

Juror Groce: No.

Mr. McCabe: Do you think the Government loyalty test which is being conducted, do you think that would stop you if you were a member of the jury which found a verdict of not guilty?

Juror Groce: No.

Mr. McCabe: Now, I ask the members of the panel, anyone who is engaged in business, a profession or trade, I ask them whether that business, profession, or trade numbers Government employees to any substantial extent, whether patrons, clientele or customers?

(There was no response.)

Mr. McCabe: Is any member of the panel an applicant for a position with the Government?

(There was no response.)

Mr. McCabe: Does any member of the panel have a relative or close friend who is on the civil service list?

Juror Grant: I have.

Mr. McCabe: Mr. Grant?

Juror Grant: I have a son who is employed by the Bureau of Standards.

39 Mr. McCabe: You have a son who is a Government employee?

Juror Grant: Yes.

Mr. McCabe: Do you think that would embarrass you in any way in consideration of this case?

Juror Grant: No, sir.

Mr. McCabe: Mr. Evans?

Juror Evans: I have a nephew who is on the police force.

Mr. McCabe: Do you think that would embarrass you in any way in rendering a fair verdict in the case?

Juror Evans: No, sir.

Mr. McCabe: Is any member of the panel associated or has been associated with any agency, either public or private, engaged in detection or law enforcement?

(There was no response.)

Mr. McCabe: Is any member friendly with any person who is now associated with any such agency of law enforcement, or engaged in detection of law violations?

(There was no response.)

Mr. McCabe: Now, has any member of the panel ever served on a jury?

Juror David: Yes.

Mr. McCabe: Mr. David?

Juror David: Yes.

Mr. McCabe: You have served on a jury in the District Court? How long ago?

40 Juror David: A year or so ago.

Mr. McCabe: I don't mean during the present session.

Juror David: No, I have been before that.

Mr. McCabe: Has anyone else been a member of a previous panel of jurors?

(There was no response.)

Mr. McCabe: Has any member of the panel served on a grand jury?

(There was no response.)

Mr. McCabe: Now, are any members of the panel receiving compensation, pensions, or other emoluments from the Government?

(There was no response.)

Mr. McCabe: Is any member of the panel associated with the Ku Klux Klan?

(There was no response.)

Mr. McCabe: Or friendly with anybody related to the Ku Klux Klan?

(There was no response.)

Mr. McCabe: Is anyone associated with the Knights of the White Camelia, or have any relatives or friends associated with it?

(There was no response.)

Mr. McCabe: Or any friends associated with the American Anti-Communist Association, or have relatives or friends related to the Anti-Communist Association?

41 Mr. David?

Juror David: Wait. I will see. Here it is.

Mr. McCabe: May I see it?

Juror David: Yes (handing a paper writing to counsel).

Mr. Fihelly: What is that?

Mr. McCabe: Here it is (handing the paper writing to Mr. Fihelly).

Now, Mr. David, may I ask you whether in view of the fact that you have joined the Anti-Communist Association, whether you could take oath and sit on a jury and give a Communist, an official of the Communist Party, the fair and unprejudiced consideration to which he is entitled?

Juror David: Sir, I would go exactly on the evidence and nothing else could change me.

Mr. McCabe: Would the fact that he was an official of the Communist Party, say, in any way influence you?

Juror David: If it is something pertaining to the violation, we are against it; other than that, I would not.

Mr. McCabe: Is any member of the panel associated with the American Action, or related or friendly with anyone related to American Action?

(There was no response.)

Mr. McCabe: Is any member of the panel associated with any person engaged in lobbying activities for

42 his group, like the National Association of Manufacturers or the Chamber of Commerce, or knows anyone employed by the person engaged in such activities?

(There was no response.)

Mr. McCabe: Is any member of the panel employed by the National Association of Manufacturers or the Chamber of Commerce?

(There was no response.)

Mr. McCabe: Is any member of the panel employed by the Washington Times-Herald?

(There was no response.)

Mr. McCabe: Is any member of the panel employed by a radio station in Washington, or friendly with any employee, related or friendly with any radio station employee?

(There was no response.)

Mr. McCabe: Does any member of the panel read the Washington Times-Herald?

(Several jurors indicated in the affirmative.)

The Court: Let them stand. You may interrogate them.

Oh, all of them? They may sit down.

Mr. McCabe: Let me ask you this: Whether your reading of the Washington Times-Herald has led you to any conclusion regarding this particular case?

(There was no response.)

43 Mr. McCabe: Has the reading of the Washington Times-Herald conditioned or prejudiced your mind in any way?

(There was no response.)

Mr. McCabe: Against a person, a member of the Communist Party, just because he is a member of the Communist Party?

(There was no response.)

Mr. McCabe: In other words, I can take it from your silence that even though you are readers of the newspaper that you could give this defendant, even though this party may have been subject to attack by the newspaper, you could give him a fair and impartial trial; is that correct?

(There was no response.)

Mr. McCabe: I think His Honor asked you whether you had read or heard anything about this case. I won't repeat that.

Now, I will ask whether any member of the panel is a member of or in association with any organization, society, lodge, or fraternity, any of those groups which have by resolution or otherwise taken a definite stand against the Communist Party, of which the defendant is an officer?

(There was no response.)

Mr. McCabe: Nobody has been a member of a society which has gone on record as denouncing Communists or communism?

(There was no response.)

44 Mr. McCabe: Now, I think I have asked all of you, those who were Government employees particular, if you have knowledge of the President's loyalty order. I will ask you whether you recall reference of the President to communists in that loyalty order in which it was stated that a member of the Communist Party was a person of questionable loyalty?

(There was no response.)

Mr. McCabe: Now, have any members of the panel heard about the Southern Conference for Human Welfare that, I believe, was in the newspapers last week?

(There was no response.)

Mr. McCabe: Have any members of the panel read about the announcement of the Committee on Un-American Activities, whose members will be called to testify here,

that it would send observers to the meeting sponsored by the Southern Conference for Human Welfare at which Mr. Henry Wallace was the principal speaker?

Juror Furlow: I read something about it in the paper.

Mr. McCabe: You feel that would not affect your judgment in the case?

Juror Furlow: No.

Mr. McCabe: Does any member of the panel understand the penalties which the loyalty order places on friendly association and friendliness with communists?

(There was no response.)

Mr. McCabe: It is in my mind that someone might feel—I ask you Government employees that particularly, that even though you concluded a verdict of not guilty
45 was called for in this case, you might still be afraid that that would be considered as having friendly association or friendliness with an officer of the Communist Party. Are you sure that would not affect your minds in any way?

(There was no response.)

Mr. McCabe: Now, is any member of the panel unaware of the attitude of the House Committee on Un-American Activities to the defendant?

(There was no response.)

Mr. McCabe: Is anyone unaware? That means you are all aware?

(There was no response.)

Mr. McCabe: Of the attitude of the House Committee on Un-American Activities toward Eugene Dennis?

(There was no response.)

Mr. McCabe: You feel you would be prepared to take oath as jurors despite that knowledge of the attitude of the House Un-American Committee toward Eugene Dennis

and go with clear unprejudiced minds into the consideration of this case?

(There was no response.)

Mr. McCabe: Is any member of the panel unaware of the hostility of the present Administration of the United States toward the Communist Party?

(There was no response.)

46 Mr. McCabe: You are all aware that the present Administration, the Government has taken a stand, a decided stand against the Communist Party?

(There was no response.)

Mr. McCabe: And not feel, or feel in any way affected by that stand in the consideration of this case?

(There was no response.)

Mr. McCabe: Has any member of the panel read or heard of the desires of the members of the House Committee on Un-American Activities with respect to the prosecution of communists?

(There was no response.)

Mr. McCabe: Does any member of the panel have in his present attitude, or his past or present associations, belong to—I might say with religious scruples, which would send him into the jury box if chosen with some feeling against this defendant, or anything in your associations or prejudices which would put this defendant somewhat in a bad position, even a little bit behind the eight-ball when he comes into court?

(There was no response.)

Mr. McCabe: I take it everyone then on this panel realizes the solemnity of the oath and the importance of the case to the Government of the United States and to this defendant and could go home afterwards, no matter
47 what the verdict is rendered, either guilty or not

guilty, and be sure that his or her conscience would be perfectly clear.

(There was no response.)

Mr. McCabe: Will Your Honor indulge me a moment? I have no further questions.

Mr. Fihelly: I have one.

Counsel has asked properly whether any jurors could return, if the evidence so indicated, a verdict of not guilty and that they would not be embarrassed.

I would like to ask any member of the panel, if the evidence warranted on the law as Your Honor gave it, could not return a verdict of guilty.

The Court: Yes.

Mr. Fihelly: As I have indicated to His Honor, counsel for the defendant has asked you, and I say properly, if you know of any reason if the evidence indicated that the defendant was not guilty, that you could not render such a verdict. On the other hand, I want to ask you if the evidence in this case on the law as His Honor gives it, indicated the guilt of the defendant beyond a reasonable doubt, would you and could you render such a verdict?

(There was no response.)

The Court: Let me ask the jurors, the prospective jurors in the box, whether any reason suggest itself to any one of you why you should not sit as jurors in this case
48 and render a fair and impartial verdict solely on the evidence and under the instructions as to the law given by the Court?

(There was no response.)

The Court: Very well. I will hear any challenges.

Mr. McCabe: Well, in the first place, I should like to challenge for cause, despite the inquiry elicited from the talesmen, all Government employees.

The Court: Do you wish to be heard on that?

Mr. McCabe: I think the reasons are clear to us all, without argument, Your Honor.

The Court: What is your position, Mr. Fihelly?

Mr. Fihelly: It has never been done, Your Honor, to challenge Government employees as such.

The Court: Not since the law was amended.

Mr. Fihelly: That is what I mean.

Mr. McCabe: Your Honor, this loyalty test does bring a new shade into the case. It is for that reason that I was urging that at this time.

The Court: Under the law, Mr. McCabe, the defendant must challenge for cause. It is denied.

Mr. McCabe: Juror number 4, Andrew M. David, I challenge Mr. David for cause on the ground that he is a member of the Anti-Communist League. I am sure Mr. David has answered all questions as honestly as possible. It is asking too much of human nature for a man who has joined the Anti-Communist League, taken the trouble
49 to join that league, to ask him to divest himself of this. He cannot divest himself of it, and accept his own judgment, and he cannot so divest himself.

We know many of us think we are unprejudiced and has been in the position where he is convinced himself that he is acting absolutely fairly and without prejudice, and some time later it occurs that he has been influenced in some way by some deep prejudice. I have had it in my own mind, that there is a little trace of bigotry in me sometimes, but I thought I was acting entirely in a disinterested fashion toward a member of some group which I considered unorthodox.

I think in these serious matters we should not allow a man to be the judge of his own ability to free his mind of prejudice, where he has gone on record as feeling that the people in this country should band together in an active Anti-Communist League.

Mr. Fihelly: It will be shown that the defendant is, as has been intimated by counsel, and it will come in in the case, the defendant is secretary of the Communist Party.

In view of the fact that the juror is a member of an organization that is anti-communist, I think that he might be impartial, and I leave it to your discretion.

The Court: I will excuse him for cause. He is excused for cause.

Mr. McCabe: Mr. David, and all the rest of the panel
50 know, that is not a reflection on Mr. David, who was most frank in his replies.

The Court: I understand.

(Andrew M. David left the jury box.)

(Mrs. Elizabeth Levine Holford took a seat in the jury box.)

The Court: Mrs. Holford, you heard the case identified by the District Attorney? Do you know the defendant?

Juror Holford: No, sir.

The Court: Do you know any of his counsel?

Juror Holford: N. sir.

The Court: Do you know the District Attorney?

Juror Holford: No.

The Court: Do you know any members of his staff?

Juror Holford: No.

The Court: Have you read anything about this case in the newspapers?

Juror Holford: I might have scanned the headlines; that is all.

The Court: Would that influence your judgment in any way?

Juror Holford: No, sir.

The Court: If you were selected as a juror in the case, could you try the case fairly and impartially and render a fair and impartial verdict solely on the evidence
51 under the law as given by the Court?

Juror Holford: Yes, s

The Court: Do you know any witnesses whose names were called by Mr. Fihelly?

Juror Holford: No, sir.

The Court: I do not think that question was asked of the other eleven. I will ask it now: Do any of the other eleven prospective jurors know any of the witnesses whose names were called?

(There was no response.)

The Court: Have you formed any opinion, Mrs. Holford, as to the guilt or innocence of this defendant?

Juror Holford: No, sir.

The Court: You may inquire, Mr. Fihelly.

Mr. Fihelly: Has any member of your family, or any close friend, ever been a member of any of the following organizations. I will not number them, just mention them: The Communist Party; the Young Communists League; the American Youth for Democracy; Washington Book Shop; Joint Anti-Fascist Refugee Committee; National Council of American-Soviet Friendship; American-Russian Institute; American Committee for the Protection of the Foreign Born; Free Germany Movement; Southern Conference for Human Welfare; Civil Rights Congress?

Juror Holford: No.

52 Mr. Fihelly: Have you subscribed or read any publications known as the "Daily Worker" or "New Masses"?

Juror Holford: No, sir.

The Court: Mr. McCabe.

Mr. McCabe: In what department of the Government are you employed?

Juror Holford: Department of Commerce.

Mr. McCabe: In what capacity?

Juror Holford: Clerk.

Mr. McCabe: As a clerk?

Juror Holford: Yes.

Mr. McCabe: Does that bring you in contact with the FBI or Congress?

Juror Holford: No, sir.

Mr. McCabe: Do you have any close friends or relatives who are employed by the Government?

Juror Holford: I have a cousin that works for the Navy.

Mr. McCabe: Have you been a member of the Anti-Communist League?

Juror Holford: No.

Mr. McCabe: Or the Ku Klux Klan?

Juror Holford: No.

Mr. McCabe: Or the White Camelia?

Juror Holford: I never heard of it.

Mr. McCabe: You heard the questions I put to the other members of the panel, and I will ask you whether in your past history, association, or feelings or
53 prejudices there is anything which would prevent you from going to that jury box and rendering a fair and impartial verdict in accordance with the evidence as you interpret it?

Juror Holford: No.

Mr. McCabe: You are familiar with the Government loyalty oath investigation?

Juror Holford: I believe I am. I have heard something of it.

Mr. McCabe: Do you feel that rendering a verdict of not guilty in this case, if you come to that conclusion, it would stop you, any criticism or embarrassment among your fellow employees?

Juror Holford: None whatsoever.

Mr. McCabe: Or by your superiors?

Juror Holford: No.

Mr. McCabe: You would not have any thought that would be taken as evidence of friendliness to communism?

Juror Holford: No; I am not worried about my job that way.

Mr. McCabe: I have no further questions.

Mr. Fihelly: May I ask the same one I did? I take it that if the evidence in this case showed the guilt of this defendant under the instructions on the law that you could render such a verdict?

54 Juror Holford: Yes.

Mr. Fihelly: Number 3, Mrs. Darby.

(Mrs. Annie Johnson Darby left the jury box.)

(William O. Howard took a seat in the jury box.)

The Court: Mr. Howard, you heard the case identified by Mr. Fihelly, the Assistant District Attorney?

Juror Howard: Yes, sir.

The Court: Do you know Mr. Fihelly?

Juror Howard: No, sir.

The Court: Do you know the District Attorney, Mr. Fay?

Juror Howard: No, sir.

The Court: Do you know any of his assistants?

Juror Howard: No, sir.

The Court: Do you know the defendant?

Juror Howard: No, sir.

The Court: Do you know any of his counsel?

Juror Howard: No, sir.

The Court: Do you know any of the witnesses whose names were called:

Juror Howard: No, sir.

The Court: Have you formed any opinion as to the guilt or innocence of the defendant?

Juror Howard: No, sir.

The Court: Have you read anything about this case in the newspapers?

55 Juror Howard: Only the headlines, sir.

The Court: Did the reading of these headlines influence your judgment in any way?

Juror Howard: No, sir.

The Court: Could you render judgment solely on the evidence under the instructions of the Court and uninfluenced by reading these headlines?

Juror Howard: Yes, sir.

The Court: Does any reason suggest itself to you why you should not sit as a juror in this case?

Juror Howard: No, sir.

The Court: Mr. Fihelly?

Mr. Fihelly: Mr. Howard, have you belonged to or has any close friend or member of your family belonged to the following organizations at any time: The Communist Party; the Young Communists League; the American Youth for Democracy; Washington Book Shop; Joint Anti-Fascist Refugee Committee; National Council of American-Soviet Friendship; American Russian Institute; American Committee for the Protection of the Foreign Born; Free Germany Movement; Southern Conference for Human Welfare; Civil Rights Congress?

Juror Howard: No.

Mr. Fihelly: Or have you subscribed to or read the publications known as the "Daily Worker" or "New Masses"?

Juror Howard: No, sir.

56 **Mr. McCabe:** Mr. Howard, I won't repeat all the inquiries I made of the other jurors. I assume you have heard them?

Juror Howard: Yes.

Mr. McCabe: I ask you: Are you a member of any anti-communist organization?

Juror Howard: No, sir.

Mr. McCabe: Like the White Camelia or any other such organization?

Juror Howard: No, sir.

Mr. McCabe: Is there anything in your history or your feeling, even your prejudices, which would put this defendant, an official of the Communist Party, in a worse light than when you come to consider his guilt or innocence than if he were not a member of such organization?

Juror Howard: No.

Mr. McCabe: Would he stand in the same position as though he were a clerk, an employee in a haberdashery store, who came here charged with a similar offense?

Juror Howard: That is right; yes, sir.

Mr. McCabe: And his political leanings or economic theories as evidenced by his being an officer of the Communist Party would not affect you in any way?

Juror Howard: No, sir.

Mr. McCabe: You feel you could go into the jury box with a clear conscience and find a verdict of guilty or
57 not guilty as warranted?

Juror Howard: Yes, sir.

Mr. McCabe: And go home with nothing on your conscience at all?

Juror Howard: Yes, sir.

Mr. Fihelly: And if the evidence in the case indicated the guilt of the defendant in connection with the instructions of law that the Court gave you, you could render such a verdict?

Juror Howard: Yes, sir.

The Court: Gentlemen, this is the time when we usually recess for lunch, and the usual time taken is one hour. So I will recess now until 1:30.

I will ask the prospective jurors in the box and the other prospective jurors in the room not to discuss this case with anyone during the noon recess and not discuss the case among yourselves. I rely on you to obey my admonition. Come back at 1:30.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 1:30 P. M.)

58 AFTERNOON SESSION

(The proceedings were resumed at 1:30 p. m., at the expiration of the recess.)

The Court: It is with the defense, as I recall it.

Mr. McCabe: Yes.

Excuse No. 6, your Honor.

The Deputy Clerk: No. 6, Mrs. Nancy Furlow.

(Mrs. Nancy Pennington Furlow left the jury box.)

The Deputy Clerk: Mrs. Margaret T. Iglehart.

(Mrs. Margaret T. Iglehart took a seat in the jury box.)

The Court: Mrs. Iglehart, be seated, please.

Did you hear Mr. Fihelly identify the case?

Mrs. Iglehart: Yes, I heard him identify it.

The Court: Do you know the defendant?

Mrs. Iglehart: No, sir.

The Court: Do you know any of his counsel?

Mrs. Iglehart: No.

The Court: Do you know Mr. Fihelly?

Mrs. Iglehart: No, sir.

The Court: Do you know the District Attorney?

Mrs. Iglehart: No, sir.

The Court: Do you know any of his assistants other than Mr. Fihelly?

Mrs. Iglehart: No, sir.

The Court: Do you know any of the witnesses
59 whose names

Mrs. Iglehart: No, I do not.

The Court: Have you formed an opinion as to the guilt or innocence of this defendant?

Mrs. Iglehart: No.

The Court: Have you read any newspaper accounts of this trial?

Mrs. Iglehart: At first just a little; not much.

The Court: Would what you have read influence your judgment in any manner?

Mrs. Iglehart: No.

The Court: If selected as a juror, could you try this case fairly and impartially?

Mrs. Iglehart: Yes, sir.

The Court: Or would you be influenced by what you read?

Mrs. Iglehart: No.

The Court: You would not be?

Mrs. Iglehart: No, sir.

The Court: Does any reason suggest itself to you why you should not sit as a juror in this case?

Mrs. Iglehart: No, sir.

The Court: Mr. Fihelly.

Mrs. Fihelly: You heard the list of organizations I read?

Mrs. Iglehart: Yes, sir.

Mr. Fihelly: Did you or any member of your family or close friends at any time belong to any of those organizations?
60

Mrs. Iglehart: No, sir.

Mr. Fihelly: Have you are any your family or close friends subscribed to the Daily Worker or New Masses?

Mrs. Iglehart: No, sir.

The Court: Mr. McCabe.

Mr. McCabe: Mrs. Iglehart, what is your employment?

Mrs. Iglehart: I am at present employed in a private concern.

Mr. McCabe: What is the nature of that business?

Mrs. Iglehart: Addressograph, Graphotype operator.

Mr. McCabe: Does your firm do any work for the Government?

Mrs. Iglehart: No, sir.

Any Government agencies?

Mrs. Iglehart: No, sir.

Mr. McCabe: Or any Congressman?

Mrs. Iglehart: No, sir.

Mr. McCabe: Do you have any acquaintance among the Members of Congress?

Mrs. Iglehart: No, not now.

Mr. McCabe: Or among the members of the F. B. I.?

Mrs. Iglehart: No, sir.

Mr. McCabe: Or other Government agencies?

Mrs. Iglehart: No, sir.

Mr. McCabe: Have you ever been a member or are you now a member of any anti-communist organization?
61

Mrs. Iglehart: None at all.

Mr. McCabe: Is there any association or feeling that you have toward the Communist Party or Communists which would make a member of that party, a Communist, on trial start off at a disadvantage in your consideration?

Mrs. Iglehart: Well, just in what way, now?

Mr. McCabe: This defendant is an officer of the Communist Party of the United States. When you come to the

consideration of the guilt or innocence of this defendant, would he be in a worse position, for instance, than somebody who was employed in a haberdashery shop or ran a restaurant?

Mrs. Iglehart: Not if he was guilty.

The Court: What was that?

Mrs. Iglehart: Not if he was guilty.

Mr. McCabe: Not if he was guilty?

Mrs. Iglehart: If he was guilty, I would say so.

Mr. McCabe: Now, supposing, in the consideration of the case, you came to a point where you were in doubt as to the guilt or innocence of the defendant, you were in some doubt as to whether the Government had introduced evidence of such quantity and such quality that, under the instructions of his Honor, a verdict of guilty could be found. If you were in doubt about that, would the fact that this defendant is a member of the Communist Party make you overcome those doubts more readily than if

62 he were not?

Mrs. Iglehart: I do not think it would.

Mr. McCabe: You think a Communist would not stand in any different light in your mind than any other person?

Mrs. Iglehart: To a certain extent, yes.

The Court: What is that?

Mrs. Iglehart: To a certain extent. If they were guilty, I would say so.

The Court: I cannot hear you, madam. Will you repeat what you said?

Mrs. Iglehart: He said if they were guilty in my mind. I would say so, if that is what he has referred to.

Mr. McCabe: I do not know whether I have made myself entirely clear. You said to a certain extent the fact that this defendant was a Communist, an officer of the Communist Party, would affect your judgment?

Mrs. Iglehart: If he were guilty.

Mr. McCabe: And it would not affect your judgment in his favor, would it?

Mrs. Iglehart: Not in his favor, no.

Mr. McCabe: It would affect it against him?

Mrs. Inglehart: Yes.

Mr. McCabe: So that this defendant would start off at a disadvantage in your mind; is that correct?

Mrs. Inglehart: Yes.

The Court: If you wish to challenge this prospective juror, I will sustain you.

63 Mr. McCabe: I challenge her.

The Court: Step down, madam.

(Mrs. Margaret T. Inglehart left the jury box.)

The Court: So the record will be clear, that challenge was for cause, Mr. Reporter.

Call another prospective juror.

The Deputy Clerk: Frank E. Jones.

Mr. Jones: Here.

(Frank E. Jones took a seat in the jury box.)

The Court: Did you hear Mr. Fihelly identify the case?

Mr. Jones: Yes, sir, I did.

The Court: Do you know Mr. Fihelly?

Mr. Jones: I do not.

The Court: Do you know the District Attorney?

Mr. Jones: I do not.

The Court: Do you know any members of his staff?

Mr. Jones: I do not.

The Court: Do you know the defendant?

Mr. Jones: I do not.

The Court: Do you know any of his counsel?

Mr. Jones: No, sir.

The Court: Do you know any of the facts in this case?

Mr. Jones: I do not.

64 The Court: Have you formed any opinion as to the guilt or innocence of the defendant?

Mr. Jones: I have not.

The Court: Have you read anything about the case in the newspapers?

Mr. Jones: I have not.

The Court: Does any reason suggest itself to you, why you should not serve as a juror in this case?

Mr. Jones: It does not.

The Court: Mr. Fihelly.

Mr. Fihelly: You heard the list of organizations that I read?

Mr. Jones: Yes, sir.

Mr. Fihelly: Have you or any member of your family or close friends at any time belonged to those?

Mr. Jones: No.

Mr. Fihelly: Have you or any member of your family or close friends at any time subscribed to or read the Daily Worker or New Masses?

Mr. Jones: I have not.

The Court: Mr. McCabe.

Mr. McCabe: Mr. Jones, you are a Post Office clerk?

Mr. Jones: Yes.

Mr. McCabe: Whereabouts are you employed?

Mr. Jones: The Post Office.

Mr. McCabe: How long have you been with the
65 Post Office?

Mr. Jones: Two or three years.

Mr. McCabe: Are any of your relatives in the employ of the Government?

Mr. Jones: No, sir.

Mr. McCabe: Now, Mr. Jones, you have heard, have you, of the loyalty test or loyalty investigation which is going on to test the loyalty of Government employees? Have you heard of that?

Mr. Jones: Yes, I have.

Mr. McCabe: Are you aware of the fact that one of the tests that might disqualify or prevent you from Government employment is friendly association with any Communist person or any Communist organizations?

Mr. Jones: That would not. I am a Civil Service employee. I have taken an examination for my job.

Mr. McCabe: Yes. Are you aware of the fact that, despite any Civil Service protection, still a finding that you were in friendly association with any Communist or Com-

munist organization would render you ineligible to continue in your Government position?

Mr. Jones: It would not.

Mr. McCabe: What?

Mr. Jones: It would not.

Mr. McCabe: Are you aware of the fact that it would render you, despite your Civil Service protection,
66 ineligible?

Mr. Jones: No, I don't think it will.

Mr. McCabe: Do you have any fear, any thought, that if you were selected as a juror in this case and you came to a decision, after hearing testimony, arguments of counsel, and the instructions of his Honor, that the Government had not made out a case beyond a reasonable doubt of the guilt of this defendant, and that you had honestly reached that conclusion—would the fact that you would go back among your fellow Government employees and perhaps have to answer questions as to how you found a Communist not guilty embarrass you or affect your consideration of the case?

Mr. Jones: No.

Mr. McCabe: You say "No"?

Mr. Jones: No.

Mr. McCabe: You are sure of that?

Mr. Jones: Yes, sir.

Mr. McCabe: Now, are you a member of any anti-communist organization?

Mr. Jones: I am not.

Mr. McCabe: Have you ever been a member of any organizations such as the Chamber of Commerce?

Mr. Jones: No.

Mr. McCabe: Do you have any close personal friends who are employees of the F. B. I.?

Mr. Jones: I have not.

67 Mr. McCabe: Or of any congressional investigating committee?

Mr. Jones: I have not.

Mr. McCabe: Now, Mr. Jones, is there anything in your history or association, your reason or your prejudices, which would make you hesitate to take the oath as a juror and give strict justice in this case?

Mr. Jones: There is not.

Mr. McCabe: You are sure that you could take the oath as a juror and render a verdict either of guilty or not guilty, as you found required by the case, and do it with a clear conscience so that it would not embarrass you or your employment at any future time?

Mr. Jones: I can.

Mr. McCabe: You know of no reason why you cannot give the defendant a fair trial, which everyone here wants him to have?

Mr. Jones: No.

Mr. McCabe: I am not the only one. Mr. Fihelly—

Mr. Fihelly: That is right.

Mr. McCabe: And, of course, the Court are just as anxious that this defendant have a fair trial as I am.

You say there is nothing in your associations which would interfere with that?

Mr. Jones: No, sir.

68 Mr. Fihelly: Your Honor, I ask permission to have a question along these lines asked of the prospective jurors. They have been asked if they belong to any anti-communist organization. I will ask your Honor to permit me to ask or your Honor ask the question, if you feel it would be more proper, as to whether any of them at any time have attended meetings of the Communist Party or have read Communist literature or adhered to the political principles of the Communist Party.

The Court: Very well.

Mr. Fihelly: This question, ladies and gentlemen, has not heretofore been asked. I address it to you now. Is there any member of the panel as now constituted who has ever attended meetings of the Communist Party?

(There was no response.)

Mr. Fihelly: Or read Communist literature, so far as you know?

Mr. Fihelly: Or do any of you adhere to the political principles and tenets of the Communist Party?

(There was no response.)

Mr. Fihelly: I take it by your silence that you answer all those questions in the negative.

The Court: It is with the Government.

Mr. Fihelly: No. 5.

69 The Deputy Clerk: Clinton M. Evans, No. 5, step-down.

(Clinton M. Evans left the jury box.)

The Deputy Clerk: James L. Lineberger.

(James L. Lineberger took a seat in the jury box.)

The Court: Did you hear the case identified by the District Attorney?

Mr. Lineberger: Yes, your Honor, I did.

The Court: Is your answer "Yes"?

Mr. Lineberger: Yes.

The Court: Do you know Mr. Fihelly?

Mr. Lineberger: No, I don't.

The Court: Do you know any members of the District Attorney's staff?

Mr. Lineberger: No, I don't.

The Court: Do you know Mr. Fay, the District Attorney?

Mr. Lineberger: No, I don't.

The Court: Do you know the defendant?

Mr. Lineberger: No, sir.

The Court: Do you know any of his counsel?

Mr. Lineberger: No, sir.

The Court: Do you know anything about this case?

Mr. Lineberger: Not at all, sir.

The Court: Have you read any newspaper accounts of this case?

Mr. Lineberger: No, I have not.

70 The Court: Have you formed any opinion as to the guilt or innocence of this defendant?

Mr. Lineberger: No, I have not.

The Court: Do you know any of the witnesses whose names were called?

Mr. Lineberger: No.

The Court: Does any reason suggest itself to you why you could not serve as a juror if selected?

Mr. Lineberger: No, sir.

The Court: Mr. Fihelly.

Mr. Fihelly: Mr. Lineberger, I take it that you heard the list of all these organizations that I read?

Mr. Lineberger: Yes.

Mr. Fihelly: Do you or any of the members of your family or close friends belong to any of these organizations?

Mr. Lineberger: No, sir.

Mr. Fihelly: Have you or any of the members of your family or close friends subscribed to or read the publications known as New Masses or the Daily Worker?

Mr. Lineberger: No, sir.

Mr. Fihelly: All right, sir.

The Court: Mr. McCabe.

Mr. McCabe: Mr. Lineberger, what is your business?

Mr. Lineberger: I am in the general hauling
71 business for myself.

Mr. McCabe: And have been for how many years?

Mr. Lineberger: For 15 years.

Mr. McCabe: In the course of your business do you do work for the Government?

Mr. Lineberger: No, I don't.

Mr. McCabe: For any Government officials?

Mr. Lineberger: No.

Mr. McCabe: Now, do you have any close friends or relatives who are employees of the Government?

Mr. Lineberger: No, I have not.

Mr. McCabe: Or of the Federal Bureau of Investigation?

Mr. Lineberger: No.

Mr. McCabe: Are you a member of any anti-communist organization?

Mr. Lineberger: No.

Mr. McCabe: Have you in the past or now formed any associations or opinions which would put a member of the Communist Party at a disadvantage in your eyes in the consideration of a charge against him?

Mr. Lineberger: No, I have not.

Mr. McCabe: You think the fact that a man is an officer of the Communist Party would not put him at any disadvantage in your eyes?

Mr. Lineberger: No.

72 Mr. McCabe: You could give him the same fair, honest trial to which every defendant is entitled?

Mr. Lineberger: Yes.

Mr. McCabe: Have you ever had any ideas such as I have outlined, any prejudice against Communists or the Communist Party?

Mr. Lineberger: I have not.

Mr. McCabe: None whatsoever?

Mr. Lineberger: No.

Mr. McCabe: Thank you.

Mr. Fihelly: Might I ask an additional question?

The Court: Yes.

Mr. Fihelly: I ask you whether at any time you have attended meetings of the Communist Party.

Mr. Lineberger: I have not.

Mr. Fihelly: Or read communist literature, so far as you know.

Mr. Mr. Lineberger: No, I have not.

Mr. Fihelly: Or do you adhere to the political principles of the Communist Party, if you know what they are?

Mr. Lineberger: Yes.

Mr. Fihelly: Pardon me?

Mr. Lineberger: No.

Mr. Fihelly: One general question. You do not know of any reason why you could not, if the evidence indicated, and from the law as his Honor gave it to you, that
73 he was guilty, return a verdict of guilty?

Mr. Lineberger: No.

Mr. Fihelly: That is all, your Honor.

Mr. McCabe: Excuse No. 1, your Honor.

The Deputy Clerk: No. 1, Aristide L. Borelli, step down, please.

(Aristide L. Borelli left the jury box.)

The Deputy Clerk: Harold W. Mackall.

(Harold W. Mackall took a seat in the jury box.)

The Court: Did you hear the case identified?

Mr. Mackall: Yes, sir.

The Court: Do you know the District Attorney?

Mr. Mackall: No, sir.

The Court: Do you know Mr. Fihelly?

Mr. Mackall: No, sir.

The Court: Do you know any members of the District Attorney's staff?

Mr. Mackall: No, sir.

The Court: Do you know the defendant?

Mr. Mackall: No, sir.

The Court: Do you know any of his counsel?

Mr. Mackall: No, sir.

The Court: Have you read anything about this case in the newspapers?

Mr. Mackall: No, sir.

74 The Court: Have you formed any opinion as to the guilt or innocence of the defendant?

Mr. Mackall: No, sir.

The Court: Does any reason suggest itself to you why you should not serve as a juror in this case if selected?

Mr. Mackall: None whatever.

The Court: Could you render a fair and impartial verdict, based solely on the evidence and the instructions as to the law given you by the Court.

Mr. Mackall: I am sure of it, yes, sir.

The Court: Mr. Fihelly,

Mr. Fihelly: Mr. Juror, you heard the list of organizations that I read to the other jurors?

Mr. Mackall: Yes.

Mr. Fihelly: Have you or any member of your family or close friends at any time belonged to any of them?

Mr. Mackall: No, sir.

Mr. Fihelly: Or have you or any member of your family or close friends at any time subscribed to or read the New Masses or Daily Worker?

Mr. Mackall: No, sir.

Mr. Fihelly: Thank you, sir.

Mr. McCabe: Mr. Mackall, you are with the Post Office Department?

Mr. Mackall: That is right.

75 Mr. McCabe: In what capacity?

Mr. Mackall: Carrier.

Mr. McCabe: How long have you been with the Post Office Department?

Mr. Mackall: 20 years.

Mr. McCabe: Are any of your relatives with the Government?

Mr. Mackall: Yes; my wife is with the D. C. Government.

Mr. McCabe: Your wife?

Mr. Mackall: With the D. C. Government.

Mr. McCabe: Mr. Mackall, does your employment bring you into contact with any members of the Committee on Un-American Affairs of the Congress?

Mr. Mackall: No, sir.

Mr. McCabe: Or with members of the Federal Bureau of Investigation?

Mr. Mackall: No, sir.

Mr. McCabe: Do you have any relatives or close friends who are connected with the Federal Bureau of Investigation?

Mr. Mackall: No, sir.

Mr. McCabe: Are you a member of any anti-communist organization?

Mr. Mackall: No, sir.

Mr. McCabe: Do you have any prejudices against Communists or against the Communist Party?

76 Mr. Mackall: No, sir.

Mr. McCabe: Have you followed some of the newspaper accounts of the attitude of the Government of the United States?

Mr. Mackall: Yes.

Mr. McCabe: As in opposition to the Communist Party?

Mr. Mackall: Yes.

Mr. McCabe: And the Communists?

Mr. Mackall: Yes.

Mr. McCabe: Would that affect your consideration in any way of a case in which, as here, an officer of the Communist Party is the defendant?

Mr. Mackall: No, sir.

Mr. McCabe: It would not affect you at all?

Mr. Mackall: No, sir.

Mr. McCabe: Is there anything in your associations, thoughts, political or economic ideas which would put a Communist at a disadvantage when you came to consider his case?

Mr. Mackall: No, sir.

Mr. McCabe: If you came to the conclusion, after hearing the evidence, the arguments of counsel, and the charge of this Court, that a verdict of not guilty was to be rendered, would you hesitate to render such a verdict because this man is a Communist?

77 **Mr. Mackall:** No, sir.

Mr. McCabe: You are familiar with the Government loyalty test now going on?

Mr. Mackall: Yes, sir.

Mr. McCabe: You are familiar with the fact that friendly association with Communists might render you subject to dismissal from your employment?

Mr. Mackall: Yes, sir.

Mr. McCabe: Would that have any effect upon you in the consideration of the verdict in this case?

Mr. Mackall: No, sir.

Mr. McCabe: I mean, if you found that a verdict of not guilty was warranted, you could go back among your fel-

low Government workers without any apologies for your verdict?

Mr. Mackall: Yes, sir.

Mr. McCabe: Do you think it might subject you to any criticism or investigation in your department because you were a member of a jury which found a verdict of not guilty where a Communist was involved?

Mr. Mackall: I do not think so.

Mr. McCabe: Do you have any doubts about it?

Mr. Mackall: No, I have not.

Mr. McCabe: Do you know of anything in your history or associations or beliefs which would render it difficult for you or render it impossible for you to take the oath
78 as a juror to come to your decision free from any prejudice, so that you would be satisfied with it afterwards?

Mr. Mackall: Yes, sir.

Mr. Fihelly: May I ask you two or three general questions which you have already permitted me to ask?

The Court: Yes.

Mr. Fihelly: If the evidence in this case, sir, in connection with the law his Honor would give you and the other members of the jury, if you were selected, indicated the guilt of this defendant beyond a reasonable doubt, could you return and would you return such a verdict?

Mr. Mackall: Yes.

Mr. Fihelly: You were asked if the fact that the defendant here was a Communist would place him at any disadvantage with you. On the other hand, would it place him at any advantage, or would he be the same as any other man charged with a crime?

Mr. Mackall: The same as any other man.

Mr. Fihelly: Have you at any time attended a Communist meeting?

Mr. Mackall: No, sir.

Mr. Fihelly: Or read Communist literature?

Mr. Mackall: No, sir.

Mr. Fihelly: Do you adhere, from what you know of them, to the principles of the Communist Party?

79 Mr. Mackall: No, sir.

Mr. Fihelly: Thank you.

No. 10.

The Deputy Clerk: No. 10, Mrs. Bessie Groce, step down, please.

(Mrs. Bessie M. Groce left the jury box.)

The Deputy Clerk: Jacob Mehlman.

(Jacob Mehlman took a seat in the jury box.)

The Court: Did you hear the case identified by Mr. Fihelly?

Mr. Mehlman: I beg your pardon?

The Court: Did you hear the case identified by Mr. Fihelly?

Mr. Mehlman: Yes, I did.

The Court: Do you know Mr. Fihelly?

Mr. Mehlman: No, sir.

The Court: Do you know any member of the District Attorney's office?

Mr. Mehlman: No, I do not.

The Court: Do you know Mr. Fay, the District Attorney?

Mr. Mehlman: I do not.

The Court: Do you know the defendant?

Mr. Mehlman: I do not.

The Court: Do you know any of his counsel?

Mr. Mehlman: I do not.

80 The Court: Do you know any of the facts of this case?

Mr. Mehlman: I do.

The Court: You do?

Mr. Mehlman: From what I read in the papers.

The Court: From what you read in the papers?

Mr. Mehlman: Yes.

The Court: You have read articles in the papers about this case?

Mr. Mehlman: I have.

The Court: Did you know the facts from any other source?

Mr. Mehlman: I do not.

The Court: Would the fact that you have read articles in the paper influence your judgment in any manner?

Mr. Mehlman: I don't think so.

The Court: What?

Mr. Mehlman: I don't think so.

The Court: I want you to be sure about it.

Mr. Mehlman: I am sure it would not.

The Court: You are sure it would not?

Mr. Mehlman: It would not.

The Court: If selected as a juror, you could give this defendant a fair and impartial trial, uninfluenced by what you may have read in the newspapers about the case; is that correct?

Mr. Mehlman: That is correct.

81 The Court: Would you decide this case solely on the basis of the evidence?

Mr. Mehlman: Absolutely.

The Court: And not on the basis of anything you might have read about the case?

Mr. Mehlman: That is right.

The Court: And by "evidence," I mean what you hear in open court. Could you?

Mr. Mehlman: That is right.

The Court: Have you formed any opinion as to the guilt or innocence of this defendant? Yes or no.

Mr. Mehlman: I am afraid I did.

The Court: You say you have?

Mr. Mehlman: I think I did.

The Court: You may be excused. Step down.

(Jacob Mehlman left the jury box.)

The Deputy Clerk: Fred E. Neff.

(Fred E. Neff took a seat in the jury box.)

The Court: Did you hear Mr. Fihelly identify this case?

Mr. Neff: Yes, I did.

The Court: Do you know Mr. Fihelly?

Mr. Neff: No.

The Court: Do you know Mr. Fay?

Mr. Neff: No.

82 The Court: Do you know any members of the District Attorney's staff?

Mr. Neff: No.

The Court: Do you know the defendant?

Mr. Neff: No.

The Court: Do you know Mr. McCabe?

Mr. Neff: No.

The Court: Or the other counsel for the defendant, Mr. Brodsky and Mr. Freedman?

Mr. Neff: No.

The Court: Have you read anything about this case in the newspapers?

Mr. Neff: Yes, when it first came out.

The Court: What is that?

Mr. Neff: When it first started out I read about it.

The Court: Would what you have read in the newspapers influence your judgment in any manner?

Mr. Neff: No, sir.

The Court: If selected as a juror, could you render a fair and impartial verdict, based solely on the evidence, uninfluenced by what you may have read in the newspapers?

Mr. Neff: Yes, sir.

The Court: What?

Mr. Neff: Yes, sir, I could.

The Court: I did not hear you.

Mr. Neff: I could.

83 The Court: Have you formed any opinion as to the guilt or innocence of this defendant?

Mr. Neff: No, sir.

The Court: Does any reason suggest itself to you why you should not serve as a juror in this case if selected?

Mr. Neff: No, sir.

The Court: Do you know any of the witnesses whose names were called?

Mr. Neff: No.

The Court: Mr. Fihelly.

Mr. Fihelly: Mr. Neff, you heard the list of organizations I read to the other prospective jurors?

Mr. Neff: Yes.

Mr. Fihelly: Have you or any members of your family or close friends belonged to any, as far as you know?

Mr. Neff: No.

Mr. Fihelly: Have you or any members of your family or close friends subscribed to the publications known as Daily Worker or New Masses?

Mr. Neff: No, sir.

Mr. Fihelly: Thank you.

The Court: Mr. McCabe.

Mr. McCabe: Mr. Neff, are you with the Naval Gun Factory is it?

Mr. Neff: Yes.

84 Mr. McCabe: How long have you been in the Government employ?

Mr. Neff: About 12½ years.

Mr. McCabe: Does your employment bring you into any close contact with members of the F. B. I.?

Mr. Neff: No, sir.

Mr. McCabe: Or other Government agencies?

Mr. Neff: No, sir.

Mr. McCabe: Members of the House Un-American Committee?

Mr. Neff: No, sir.

Mr. McCabe: Have you followed the activities of the House Committee on Un-American Affairs?

Mr. Neff: No, I have not.

Mr. McCabe: You are aware of the fact that a loyalty test or investigation is now going on to determine the fitness of Government employees to remain in the employ of the Government?

Mr. Neff: Yes.

Mr. McCabe: And are you aware of the fact that friendly association with Communists might be held to be cause for dismissal?

Mr. Neff: Yes, sir.

Mr. McCabe: Knowing that, do you feel, when you came to the consideration of the case, in which, as here, a high official of the Communist Party is the defendant, that the finding of a verdict of not guilty, if you conscientiously arrived at such a verdict, that verdict would
85 subject you to criticism in your place of employment?

Mr. Neff: No, sir.

Mr. McCabe: You do not think that your fellow employees would look askance at you because you had freed a Communist?

Mr. Neff: No, sir.

Mr. McCabe: Or members of the House Un-American Committee had appeared and testified against him?

Mr. Neff: No, sir.

Mr. McCabe: It would not have any effect on you at all?

Mr. Neff: No, sir.

Mr. McCabe: Have you ever been a member of any anti-communist organization?

Mr. Neff: No, sir.

Mr. McCabe: Have you ever formed any opinion as to the political or economic theories of the Communist Party which would put a member of that party at a disadvantage in your eyes when you were considering a serious charge against him?

Mr. Neff: No, sir.

Mr. McCabe: There is nothing in your associations or prejudices or feelings which would put a Communist at a disadvantage?

Mr. Neff: No, sir.

Mr. McCabe: And you would give him the same fair, honest trial as you would give any other person?

Mr. Neff: Yes, sir.

86 Mr. Fihelly: Is there anything in your way of thinking that would put a Communist at an advantage over any other defendant in a trial?

Mr. Neff: No, sir.

Mr. Fihelly: And if the evidence, in connection with the law as the Court will give it to you, if you are selected as a juror, indicated the guilt of this defendant beyond a reasonable doubt, could you and would you return such a verdict?

Mr. Neff: Yes, sir.

Mr. Fihelly: Have you at any time attended a Communist meeting?

Mr. Neff: No, sir.

Mr. Fihelly: Or read Communist literature?

Mr. Neff: No, sir.

Mr. Fihelly: Or, if you do know what the political philosophy or tenets of the Communist Party are, do you adhere to them?

Mr. Neff: No, sir.

Mr. Fihelly: That is all.

Mr. McCabe: Excuse No. 11, your Honor.

The Deputy Clerk: No. 11, Leroy Harris, step down, please.

(Leroy Harris left the jury box.)

The Deputy Clerk: Percy Parham.

87 (Percy Parham took a seat in the jury box.)

The Court: Did you hear the case identified by Mr. Fihelly?

Mr. Parham: Yes, sir.

The Court: Do you know Mr. Fihelly?

Mr. Parham: No, sir.

The Court: Do you know Mr. Fay?

Mr. Parham: No, sir.

The Court: Do you know any members of the District Attorney's staff?

Mr. Parham: No, sir.

The Court: Do you know the defendant?

Mr. Parham: No, sir.

The Court: Do you know any of his counsel?

Mr. Parham: No, sir.

The Court: Do you know any of the witnesses whose names were called.

Mr. Parham: No, sir.

The Court: Have you read anything about this case in the newspapers?

Mr. Parham: No, sir.

The Court: Do you know any of the facts in this case?

Mr. Parham: No, sir.

The Court: Have you formed any opinion as to the guilt or innocence of the defendant?

88 Mr. Parham: No, sir.

The Court: Does any reason suggest itself to you why you should not serve as a juror in this case if selected?

Mr. Parham: No, sir.

The Court: Mr. Fihelly.

Mr. Fihelly: Mr. Parham, you heard the list of organizations I read to the other prospective jurors?

Mr. Parham: I did.

Mr. Fihelly: Have you or any member of your family or close friends at any time belonged to any of them?

Mr. Parham: No, sir.

Mr. Fihelly: Or have you or any member of your family or close friends subscribed to the Daily Worker or New Masses or read the Daily Worker or New Masses?

Mr. Parham: No, sir.

Mr. Fihelly: That is all, your Honor.

Mr. McCabe: Mr. Parham, you are with the Post Office also?

Mr. Parham: I am with the Government Printing Office.

Mr. McCabe: I was thinking of the old G. P. O., General Post Office, some place else. How long have you been with the Government?

Mr. Parham: About 25 years.

Mr. McCabe: Does your employment there bring you into contact with any members of the F. B. I.?

89 Mr. Parham: No, sir.

Mr. McCabe: Members of the House Committee on Un-American Affairs?

Mr. Parham: No, sir.

Mr. McCabe: Just what is the nature of your work there?

Mr. Parham: I work on the Congressional Record.

Mr. McCabe: Do you set up type?

Mr. Parham: I don't set up type. I help on the press, operating help on the press.

Mr. McCabe: I guess you are too busy to read everything that goes through there?

Mr. Parham: Don't have time.

Mr. McCabe: Mr. Parham, you are familiar with the Government loyalty investigation which is going on now?

Mr. Parham: I am.

Mr. McCabe: Do you have any thought or fear that if you, after hearing the testimony in this case, the arguments of counsel, and the charge of the Court, arrive at a point where you felt that a verdict of not guilty was warranted, you would be subject to any criticism among your fellow employees for having found a guilty of not guilty against a Communist?

Mr. Parham: I don't think it would.

Mr. McCabe: You do not think it would?

Mr. Parham: No, At least, I know it would not.

Mr. McCabe: You know it would not?

90 Mr. Parham: No, sir.

Mr. McCabe: How long has this been in your mind—that you know it would not subject you to criticism?

Mr. Parham: Well, I just retracted my first statement.

Mr. McCabe: You feel you did not give it full consideration?

Mr. Parham: No, sir.

Mr. McCabe: Are you sure of it?

Mr. Parham: I am sure of it.

Mr. McCabe: Have you ever been a member of any anti-communist organization?

Mr. Parham: No, sir.

Mr. McCabe: Have you any feeling about the political or economic theories of the Communist Party which would

put a member of that party at a disadvantage when you were considering his guilt or innocence of charges?

Mr. Parham: No, sir.

Mr. McCabe: Do you think you could give an officer of the Communist Party the same trial that you would give a taxi driver out here or any other resident of the District of Columbia?

Mr. Parham: I would.

Mr. McCabe: It would not weigh with you at all—the fact that he was a Communist?

Mr. Parham: No, sir.

91 Mr. McCabe: Is there anything from your associations, history, or beliefs which would make you hesitate to take an oath as a juror in a case of this kind?

Mr. Parham: No, sir.

Mr. McCabe: You have been on the panel how long?

Mr. Parham: I have been serving all this month.

Mr. McCabe: Have you been sitting on any cases in which members of the Communist Party or alleged members of the Communist Party were involved?

Mr. Parham: No, sir.

Mr. McCabe: A question just occurred to me. I did not realize that some of these other cases had been tried before this panel.

The Court: You may make inquiry.

Mr. McCabe: I would like to ask now of the members of this panel whether any of you has served as a juror in a case in which any Communists or Communist sympathizers or adherents were being placed on trial.

(There was no response.)

Mr. McCabe: Thank you.

Mr. Fihelly: Mr. Parham, if the evidence in this case, in connection with the law as the Court will give it to you, indicated the guilt of this defendant beyond a reasonable doubt, could you and would you return such a verdict?

Mr. Parham: Yes, I would.

92 Mr. Fihelly: You were asked if there was anything about the fact that the defendant is a Commu-

nist that would act against his advantage. Is there any thing about that fact that would act to his advantage, or would you try him just the same as any other defendant?

Mr. Parham: Just the same as any other.

Mr. Fihelly: Have you at any time attended any Communist meetings?

Mr. Parham: No, sir.

Mr. Fihelly: Or read Communist literature, as far as you know?

Mr. Parham: No.

Mr. Fihelly: Or do you adhere to the political principles of the Communist Party, if you know what they are?

Mr. Parham: No.

Mr. Fihelly: I believe that is all.

I think that exhausts the challenges on both sides.

Mr. McCabe: I believe so, your Honor.

The Court: Would you gentlemen come to the bench?

(Counsel for both sides approached the bench, and the following occurred:)

The Court: I would like your judgment as to whether I ought to get an alternate juror or alternate jurors.

Mr. Fihelly: I would be in favor of getting at least
93 one.

Mr. McCabe: I think it might be a wise precaution. I do not think it will be a long, drawn-out case. It is a fairly healthy looking jury, but while we are at it, we might as well get one or two more.

The Court: Why not get two?

Mr. Fihelly: We might as well.

The Court: It would not take much longer than getting one.

Mr. Fihelly: I think the case will probably take the rest of the week. We have spent most of the day picking the jury.

The Court: Mr. Marshal, will you arrange to have two chairs placed next to the jury so I can have some alternate jurors selected?

Mr. McCabe: With regard to challenges, shall we have one challenge apiece?

The Court: Let us see what the new rules provide.

Mr. Fihelly: One on each side, I think, for alternates.

The Court: It is a little different depending on the number.

Rule 24(c) reads as follows:

“Alternate jurors. The court may direct that not more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace
94 jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, and two peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.”

Each side has one.

(Counsel resumed their places at the trial table, and the following occurred:)

The Court: Call two more, Mr. Clerk, when it is convenient.

The Deputy Clerk: Merrill E. Raybould and Marion C. Rensberger.

(Merrill E. Raybould and Marion C. Rensberger took seats alongside the jury box.)

95 The Court: Did you hear Mr. Fihelly identify the case? I am addressing my remarks to both of you.

Mr. Raybould: Yes, sir.

Mr. Resenberger: Yes, sir.

The Court: Do you know Mr. Finelly?

Mr. Raybould: No, sir.

Mr. Resenberger: No, sir.

The Court: Do you know Mr. Fay?

Mr. Raybould: No, sir.

Mr. Resenberger: No, sir.

Mr. Raybould: I think I can save time——

The Court: No, you cannot save time. Answer the questions.

Mr. Raybould: I don't know him, no, sir.

The Court: Do you know the defendant?

Mr. Raybould: No, sir.

Mr. Resenberger: No, sir.

The Court: Do you know any of his counsel?

Mr. Raybould: No, sir.

Mr. Resenberger: No, sir.

The Court: Have either of you read anything about this case in the newspaper?

Mr. Raybould: Yes, sir.

Mr. Resenberger: Yes, sir.

The Court: I will take the one who was first called.
96 What is your name, sir?

Mr. Raybould: Raybould.

The Court: Mr. Raybould, would the fact that you have read about this case in the newspapers influence your judgment in any manner?

Mr. Raybould: No, sir.

The Court: Could you decide this case simply on the evidence, uninfluenced by anything you have read in the newspapers?

Mr. Raybould: Not in the newspapers, sir, but I am prejudiced.

The Court: You are?

Mr. Raybould: Yes, sir.

The Court: Well, you will be excused.

(Merrill E. Raybould left the jury box.)

The Deputy Clerk: William W. Richardson, take seat No. 1.

(William W. Richardson took a seat alongside the jury box.)

The Court: Sit down, Mr. Richardson. Did you hear the case identified by Mr. Fihelly?

Mr. Richardson: Yes, sir.

The Court: Do you know Mr. Fihelly?

Mr. Richardson: No, sir.

The Court: Do you know Mr. Fay?

97 Mr. Richardson: No, sir.

The Court: Do you know the defendant?

Mr. Richardson: No, sir.

The Court: Do you know any members of the District Attorney's staff?

Mr. Richardson: I don't know—not to my knowledge, but I don't know who they are.

The Court: What is that?

Mr. Richardson: I do not know who is on the staff, but I do know whether I do or not—not to my knowledge.

The Court: Do you know any of the attorneys for the defendant?

Mr. Richardson: No, sir.

The Court: Have you read anything about this case in the newspapers?

Mr. Richardson: Only the headlines, I think a couple of months ago.

The Court: Would that influence your judgment in any manner?

Mr. Richardson: I am afraid it would.

The Court: You may be excused.

(William W. Richardson left the seat alongside the jury box.)

The Deputy Clerk: Miss Arabella J. Scott.

(Miss Arabella J. Scott took a seat alongside the

98 jury box.)

The Court: If you gentlemen cannot hear these answers, because of the inconvenient place where these jurors are seated, you may come forward.

Mr. McCabe: Thank you. We are able to catch them so far.

The Court: What is your name?

Miss Scott: Arabella Scott.

The Court: Mrs. Scott?

Miss Scott: Miss Scott.

The Court: Did you hear the case identified by Mr. Fihelly?

Miss Scott: Yes, I did, and I would like to say I am prejudiced.

The Court: You are prejudiced?

Miss Scott: Yes.

The Court: You will be excused.

(Miss Arabella J. Scott left the seat alongside the jury box.)

The Deputy Clerk: John W. Scott.

The Court: John M. Scott. Is that the name? What do you have on your list?

The Deputy Clerk: That is right, John M. Scott. My mistake.

(John M. Scott took a seat alongside the jury box.)

99 The Court: Mr. Scott, did you hear the case identified by Mr. Fihelly?

Mr. Scott: Yes.

The Court: Do you know Mr. Fihelly?

Mr. Scott: No, sir.

The Court: Do you know Mr. Fay, the District Attorney?

Mr. Scott: No, sir.

The Court: Do you know any member of his staff?

Mr. Scott: No, sir.

The Court: Do you know the defendant?

Mr. Scott: No, sir.

The Court: Do you know any of his counsel?

Mr. Scott: No, sir.

The Court: Do you know anything about this case at all?

Mr. Scott: No, sir.

The Court: Have you read anything about it in the newspapers?

Mr. Scott: No, sir.

The Court: Have you formed any opinion as to the guilt or innocence of this defendant?

Mr. Scott: No, sir.

The Court: Does any reason suggest itself to you why you should not serve as an alternate juror and, if a vacancy occurs on the jury during the trial, as a juror—anything—that would prevent you from fairly and impartially sitting as a juror?

Mr. Scott: No, sir.

The Court: I do not think I finished asking you these questions—What is your name?

Mr. Rensberger: Rensberger.

The Court: Mr. Rensberger, I think when I stopped interrogating you, you said you had read something about it in the newspapers?

Mr. Rensberger: That is right.

The Court: Would that influence your judgment in any manner?

Mr. Rensberger: No, sir, not what I read.

The Court: You could try this case fairly and impartially, uninfluenced by what you read in the newspapers?

Mr. Rensberger: No, sir.

The Court: You could not?

Mr. Rensberger: No, sir.

The Court: You are excused.

(Mr. Rensberger left the seat alongside the jury box.)

The Deputy Clerk: Lloyd J. Streifuss.

(Lloyd J. Streifuss took a seat in the jury box.)

The Court: Mr. Streifuss, did you hear Mr. Fihelly identify the case?

Mr. Streifuss: I did.

The Court: Do you know Mr. Fihelly?

101 Mr. Streifuss: No.

The Court: Do you know Mr. Fay, the District Attorney?

Mr. Streifuss: No, sir.

The Court: Do you know any members of his staff?

Mr. Streifuss: No, sir.

The Court: Do you know the defendant?

Mr. Streifuss: No, sir.

The Court: Do you know Mr. McCabe?

Mr. Streifuss: No, sir.

The Court: Or Mr. Brodsky or Mr. Freedman, his attorneys?

Mr. Streifuss: No, sir.

The Court: Have you read anything about this case in the newspapers?

Mr. Streifuss: No, sir.

The Court: Have you formed any opinion as to the guilt or innocence of this defendant?

Mr. Streifuss: No, sir.

The Court: Does any reason suggest itself why you should not be selected as an alternate juror in this case?

Mr. Streifuss: No, sir.

The Court: Do you know any of the witnesses whose names were called?

Mr. Streifuss: No, sir.

The Court: I will ask you, Mr. Scott, whether you know any of the witnesses whose names were called.

Mr. Scott: No, sir.

The Court: Very well, gentlemen. You may amplify my questions:

Mr. Fihelly: Mr. Scott and Mr. Streifuss, I address this question to both of you. Did you hear the list of organizations I read to the prospective jurors?

Mr. Scott: Yes.

Mr. Streifuss: Yes.

Mr. Fihelly: Have you or any members of your family or close friends ever belonged to these organizations?

Mr. Scott: No, sir.

Mr. Streifuss: No, sir.

Mr. Fihelly: Do either of you subscribe or read the publications known as Daily Worker or New Masses?

Mr. Scott: No, sir.

Mr. Streifuss: No, sir.

Mr. McCabe: Mr. Scott, how long have you been employed by the Government?

Mr. Scott: About 4 years.

Mr. McCabe: Does your employment bring you in contact with any members of the F. B. I.?

Mr. Scott: No, sir.

Mr. McCabe: Or other activities in any way?

Mr. Scott: No, sir.

103 Mr. McCabe: Or with the members of the House Committee on Un-American Affairs?

Mr. Scott: No, sir.

Mr. McCabe: Does it bring you in contact with the affairs of Congress at all?

Mr. Scott: Well, not directly. I am a mimeograph operator. We make out reports and take accounts.

Mr. McCabe: You have heard me outlining to the other prospective jurors the question of the present investigation as to the loyalty of Government employees and the possible effect of the finding that any employee had what is called friendly association with any Communists. Now, do you think that, if you became a juror in this case through illness or unavailability of some other juror, there would be some fear in your mind that if you found a verdict of not guilty in this case you would be looked upon, whether rightly or wrongly, as showing friendship for a Communist?

Mr. Scott: I would not be affected by that.

Mr. McCabe: Do you think that that feeling might exist in your superior officers?

Mr. Scott: I don't know.

Mr. McCabe: Do you belong to any anti-communist association?

Mr. Scott: No, sir.

104 Mr. McCabe: Do you have any feelings or thoughts arising from some prejudice or opposition to the economics or political theories of the Commu-

nist Party that would put a Communist at a disadvantage when you came to consider his case?

Mr. Scott: No, not in a case of this sort.

Mr. McCabe: Not in a case of this sort. Would it in a case of any sort?

Mr. Scott: I could not say that. There are so many cases that might come up.

Mr. McCabe: Yes. That is just what I am trying to get at, Mr. Scott. Regardless of the nature of the case, is it possible that your feelings regarding the Communists and the Communist Party would influence you in some way against the defendant, who is a member of the Communist Party?

Mr. Scott: No.

The Court: The answer is "No"?

Mr. Scott: No.

Mr. McCabe: You are sure that that feeling would not exist?

Mr. Scott: Yes.

Mr. McCabe: That you could approach the consideration of the case, in which an officer of the Communist Party is the defendant, with the same detached, disinterested, clear, intelligent approach that you would if the defendant were a clerk in a department store or a taxi driver or any other person who was a worker? Do you think you could
105 do that?

Mr. Scott: Yes, sir.

Mr. McCabe: Is there any doubt about it?

Mr. Scott: No, sir.

Mr. McCabe: Mr. Streifuss, you have been listening to these questions and I see that at some of them you were shaking your head. Taking them as addressed to you, so I won't repeat them, I will ask you if there is anything in your association, from the ordinary human prejudices that most of us have, which would put an officer of the Communist Party at a disadvantage when you came to consider the charges against him?

Mr. Streifuss: No, sir.

Mr. McCabe: Would the fact that charges against him were being pressed by members of the Congress of the United States have any weight in your mind against him?

Mr. Streifuss: No, sir.

Mr. McCabe: And if, at the conclusion of the case, you became a juror and you were convinced that from the evidence and the charge of his Honor, the Government had not made out a case beyond a reasonable doubt; that therefore a verdict of not guilty was warranted, you would not hold to that verdict?

Mr. Streifuss: I would.

Mr. McCabe: You would not have any hesitation?

Mr. Streifuss: No, sir.

Mr. McCabe: Just as, of course, if you found a
106 verdict of guilty warranted, you would not have any hesitation about it?

Mr. Streifuss: That is right.

Mr. McCabe: You could render a verdict which would leave you with a clear conscience?

Mr. Streifuss: Yes, sir.

Mr. Fihelly: I address this question to both of you prospective alternate jurors. In case you were selected as alternate jurors and later on it so happened that either or both of you became jurors in this case, first of all, I ask you whether or not any of you have attended meetings of the Communist Party.

Mr. Scott: No.

Mr. Streifuss: No.

Mr. Fihelly: Or read Communist literature, so far as you know.

Mr. Scott: No.

Mr. Streifuss: No.

Mr. Fihelly: Or adhere to the principles or philosophy of the Communist Party, if you know what they are.

Mr. Scott: No.

Mr. Streifuss: No.

Mr. Fihelly: You were asked if either of you held the defendant at a disadvantage because he was a Communist.

Let me ask you the question in reverse, whether
 107- either of you would hold him at an advantage because he was a Communist, or would you treat him the same as any other defendant?

Mr. Scott: Yes.

Mr. Streifuss: Yes.

Mr. Fihelly: And if the evidence indicated the guilt of this defendant, under the law as his Honor will give it to you, you would return and could return such a verdict?

Mr. Scott: Yes.

Mr. Streifuss: Yes.

Mr. Fihelly: Thank you.

We are satisfied with both alternate jurors.

Mr. McCabe: We have no challenge of the alternate jurors.

The Court: Very well.

I wish to say to jurors 13 and 14 that they are chosen as alternate jurors, but they should give the same close attention to the case and to the evidence that they would if they were chosen as jurors, because they might have to serve as jurors if one or two of the jurors become disqualified during the course of the trial. So, for all practical purposes, I want to ask jurors 13 and 14, the two alternate jurors, to give the case and the testimony the same close attention that you would give it if you were one of the 12 or two of the 12.

Now, Mr. Clerk, you may swear the jury.

(The following jurors and alternate jurors were
 108- duly sworn:)

- | | |
|------------------------|------------------------|
| 1. Harold W. Mackall | 8. Stanley D. Grant |
| 2. Paul B. Burke | 9. Amanda E. Grigsby |
| 3. William O. Howard | 10. Fred E. Neff |
| 4. Elizabeth Levine | 11. Percy Parham |
| Holford | 12. Arthur Hirsh |
| 5. James L. Lineberger | 13. John M. Scott |
| 6. Frank E. Jones | 14. Lloyd J. Streifuss |
| 7. Elizabeth Morton | |
| Gingrich | |

The Court: Do I understand that Mr. Scott is juror 13 and Mr. Steifuss is juror 14? Is that correct?

Mr. Fihelly: Yes.

The Deputy Clerk: Yes.

The Court: Who was called first?

The Deputy Clerk: Mr. Scott.

The Court: Mr. Scott. All right.

We will take a 5-minute recess.

(A short recess was had.)

The Court: Mr. Clerk, you will excuse all witnesses.

The Deputy Clerk: All witnesses in this case for both sides retire to the witness room.

The Court: You may proceed.

109 Opening Statement on Behalf of United States.

Mr. Fihelly: May it please the Court and you members of the jury and alternate jurors, we have already outlined to you briefly what the indictment charges, but I will repeat it briefly.

It charges this defendant with having, on April 9, after he had been summoned to this committee and served a summons by the Committee on Un-American Activities of the House of Representatives—they were to hold a hearing on that particular day—wilfully defaulted; that is, did not put in an appearance when the committee met and expected to question him and to take his testimony on that date.

Title 2, section 192, of the United States Code charges that as an offense and makes it a misdemeanor.

In support of the indictment and the charge contained therein, the Government will show you, briefly, these facts, ladies and gentlemen: that for some time the defendant in this case has been a member of the Communist Party; that, in connection with the hearing which was being held by the Committee on Un-American Activities of the House of Representatives on March 26 of this year, he had, roughly eight days before that time, sent a wire to Mr.

John Parnell Thomas, the Congressman who is chairman of that particular committee, and asked to be heard as a representative of the Communist Party; and he was at that time and is now—the defendant—secretary of the
 110 Communist Party.

The Committee on Un-American Activities at that particular time was taking testimony on the activities of the Communist Party in the United States and the activities of its members, and generally the committee, as it was brought into existence in the Seventy-Ninth Congress in August of 1946, and as it again was renewed and continued its existence in the Eightieth Congress, in January of this year, and is still functioning, was examining, under the law, general propaganda conditions of an un-American and subversive source in this country.

In response to the wire that we will show you that the defendant sent to Congressman Thomas, he received a reply that the committee would be glad to hear him on the 26th of March of this year at the committee rooms in Washington, D. C.

Next, the defendant sent a wire to Mr. Thomas and wanted to know if he could have 2 hours at that session in which to speak as a representative of the Communist Party.

Mr. Thomas, the chairman, replied with another wire that he would be allotted and could have the requested 2 hours.

On March 26, in the morning, the committee held a regular meeting. Several witnesses appeared, and among the witnesses who were present was that defendant Dennis in this case. We will show you that he entered the committee room accompanied by one or more other members of the
 Communist Party.

111 There came a time when he was called and was to be given the allotted 2 hours in which to give his testimony. The chairman of the meeting was the chairman of the committee, Congressman Thomas, of New Jersey.

Mr. Stripling, for the Congressman, asked the first question of the defendant when he took the stand. He was sworn in by the chairman and he was asked his name and replied, "Eugene Dennis."

We will show you that the committee had information that the defendant is a member of the Communist Party, had used at least five names, and Mr. Stripling then asked the question, "Is that your party name or is that your real name?"

The defendant refused to answer that question.

Congressman Thomas then asked him substantially the same question and asked the question in substantially the same way, and other detailed questions. The defendant would not answer the questions which were propounded by Congressman Thomas.

We will then show you that Mr. Peterson, a member of this committee, then asked the defendant the same questions, substantially, and on one or more occasions asked the same questions, and the defendant again refused to answer as to whether Eugene Dennis was his real name or was his party name.

In general, when these three gentlemen questioned him as to what his real name was, he refused to answer as to what name he was born under, as to what other names

he had used; so when these questions had been
112 asked over several minutes and they had not been answered, we will show you that Congressman Thomas, the chairman, then said to Mr. Stripling, "Have

a subpoena served on this witness to return on April 9."

Now, mark you, he had not been subpoenaed for the meeting on March 26. He came at his own suggestion, we will show you, at his own request; but when he would not answer the questions propounded, would not answer even the first question as to what his name was, Mr. Thomas, the chairman, then instructed the chief investigator, Robert E. Stripling, to place a subpoena on him—it was the first time he was under subpoena—for a hearing to

give testimony before the committee at its next session on April 9.

Mr. Stripling then served the subpoena, in the presence of the committee, on the defendant here, Eugene Dennis, as the indictment names him, otherwise known as Francis Waldron. Stripling told him what it was: "This is a subpoena of the House Committee on Un-American Activities that I am serving on you to be here as a witness on April 9."

We will show you that at or about that time a friend who had accompanied the defendant into the committee session and room said, "This defendant accepts no subpoenas from anyone," and shortly thereafter the defendant, who had been served with the subpoena, took it and slapped it or slammed it down on a table and left 113 it in the committee room and did not even take the subpoena with him.

We will show you that when Mr. Stripling served the subpoena of the defendant here, he addressed the chair and, for the record, he said, "Mr. Chairman, may the record show that Mr. Dennis, the witness here"—the defendant in this case—"has been served with the subpoena as you request?"

Mr. Thomas, as chairman, responded that "The record will so show that he has been served."

We have the subpoena that the defendant slammed on the table and left in that committee room, and we will show it to you. He did not even take it with him, as I stated.

The subpoena was served for April 9. On the 7th of April of this year, two days before the defendant was to respond to the subpoena of the House of Representatives and the Committee on Un-American Activities, a wire was sent to him at the instigation and request of the chairman of the committee, Congressman Thomas. He requested Mr. Stripling, the chief investigator, to send a wire to the defendant calling to his attention that he had been subpoenaed for April 9 before the Committee on Un-

American Activities to give testimony and that he was supposed to be here in Washington pursuant to that subpoena for that purpose.

That wire was unanswered, and we will show you the subpoena was not answered; that when the committee started in its session on April 9—that is, at its
 114 committee rooms in Washington, D. C.—this defendant did not respond, nor did he put in an appearance at any time that day or any other date before the committee.

If we show you generally those facts, ladies and gentlemen, show that the default was as wilful as it could be, we will ask, of course, at the proper time, for a verdict of guilty as indicted, at your hands.

Opening Statement on Behalf of Defendant.

Mr. McCabe: Members of the jury, as to the facts which will be developed concerning the proceedings at each of these two meetings, if the Court finds them relevant, there probably won't be too much dispute. There certainly may be the ordinary divergence of reporting the observation of what we have seen, as each one of us would diverge from the other if we were describing what went on here today.

First of all, we will show you, through the testimony which will be developed from the stand, and, in large measure, the testimony of the Government itself, that this default was far from wilful.

We will show you, on one matter that my friend, not wanting to go into all of the testimony, omitted, that on the day, April 9, I believe, when the subpoena called for the appearance of Eugene Dennis, his attorney appeared with a letter from Mr. Dennis explaining why he was
 115 not responding to the subpoena, and that that letter set forth in detail the allegations, the advice, which the defendant had received that this committee had no right to subpoena him—

Mr. Fihelly: If your Honor please, I object to that statement. Justice Keech has already ruled that that letter that counsel is speaking of was not a defense to this prosecution and is not a defense in this case. Attacking the legality of the committee, under the Sinclair case and other cases, is not a defense. All of the Justices have ruled that this is a lawful matter—

The Court: This is an important matter to the defense. I will excuse the jury.

Mr. Fihelly: I think it should be cleared right at the outset of the case.

The Court: Out of their presence.

The jury will retire from the courtroom and remain outside in their jury room until summoned back.

(The jury left the courtroom.)

116 The Court: You said that Judge Keech decided this point? I will hear you on that.

Mr. Fihelly: Yes. One of the points, in addition to the motion to dismiss, there was filed and argued before Justice Keech on behalf of the defendant a motion to inspect the grand jury minutes, and in denying the motion to dismiss and inspect the grand jury minutes—they wanted to inspect the grand jury minutes because they said a statement had been given by the defendant through his attorney to the House committee.

Four reasons were set forth in attacking the House committee, and the defense said these questions were not presented to the grand jury, and they wanted to inspect the minutes, and if that had been this indictment in the case would probably not have resulted.

The motion to dismiss was denied and the motion to inspect the grand jury minutes denied, and in the next to the last paragraph of Mr. Justice Keech's opinion, which you have there, and I have a copy of it here, you will see what he said with respect to the motion. It is on page 9 (handing a paper writing to the Court).

The Court: I have it.

Mr. Fihelly: The next to the last paragraph reads: "Counsel for the defendant petitioned the Court to ascertain and make use of in connection with this motion matters before the grand jury. This petition is
117 denied in that the Court holds as a matter of law that the letter of the defendant to the Chairman of the Committee on Un-American Activities, dated April 8, 1947, is not a bar to prosecution for failure to attend."

There were four different grounds in that letter, which is the most inflammatory and scurrilous of letters, and the committee was supposed to be unconstitutional and the law unconstitutional.

Every Judge who has tried one of these cases within the last few weeks or few months has held that the resolution was a constitutional one in that the committee was a constitutional one. One of the additional factors set forth in one of the four reasons is at great length and is important to stress because of the type of jury, and the defendant is here today wanting to put in several pages in that letter, which was devoted to the fact that Mr. Rankin, who was a member of the committee, wasn't a lawfully elected member because of the fact that the colored voters of Mississippi have not been allowed to properly vote, and therefore he and other members were not properly qualified. That argument is set forth in great length, and it is set forth in an inflammatory way, and it attacks the constitutionality of the committee.

But each Justice hearing these cases has upheld the validity of the resolution and the constitutionality of the purposes and functions of the committee, with
118 respect to Mr. Rankin and every other, and Justice

Keech upheld the validity of the resolution and the constitutionality of it. The argument that Mr. Rankin was not a valid member, therefore, was not proper in respect to the motion, and this letter was not held a defense.

If Your Honor will take a glance at it, you will see it is defamatory, inflammatory, scurrilous, and a most un-American document, and the inflammatory utterances that appear make it highly improper, not only because of the verbiage of the document, but because of the principle of law that it could not be a defense.

Mr. McCabe: I have the opinion of Judge Keech here. Far from maintaining Mr. Fihelly's position, it maintains our position. Paragraph 5 at the bottom of page 8, Judge Keech said: "Counsel for defendant attacks the indictment on the ground that it fails to show compliance with Section 194 of Title 2, U. S. C. This is a matter of defense."

Section 194 requires that the proponents of an indictment for contempt refer to the House the facts out of which the situation arose. Now, the records show, and we will say here, that the Committee on Un-American Affairs ignored that. They didn't go to the House. When they send that citation for contempt, they didn't give he facts. They didn't give the contents which this letter contained, and it shows lack of wilfulness, which would work 119 to the exoneration of the defendant.

Judge Keech didn't say it was not a defense. He said the direct contrary. At the top of page 9, he said: "This is a matter of defense," and citing the case of Chapman, 166 U. S. 661, 667.

I think that certainly shows we are entitled to use that letter in asking the jury to look into the minds of this defendant and see whether wilfulness was there at the time he ignored the subpoena of this committee. I think that is a very important thing. I think that this defendant is entitled to have a jury pass upon it. That is the gravamen of the offense as to wilfulness. The mere failure to honor the subpoena is not a crime. It is the wilful default, and that is a question of one's state of mind. I propose to argue the basis for that.

Mr. Fihelly referred to the letter as scurrilous. I would say that letter is mild in its terms as compared with the

terms which I proposed to apply to this committee. I think this committee was, and I propose to show this to the jury, that this committee was far from being a legitimate honest, decent committee of the Congress of the United States and is an infamous conspiracy, that in its existence it has never had an honest, decent purpose. I propose to show by the comparison of its treatment of known Nazi sympathizers, and known enemies, persons who were
 120 coddled, and who when called before the committee, they weren't asked their right names. They were given permission to read long statements to the committee, and were thanked by the committee when they left.

I propose to show that this committee is an unconstitutional committee because it has no legislative purpose. That may have been argued. I don't think that it has been argued as a matter of law, and I don't want to be foreclosed from raising some points here in arguing about a lack of wilfulness on the part of the defendant.

I expect to show that the committee itself has disclaimed any legislative purpose, that they have said: We realize we cannot pass laws about this, but by the force of public opinion they can bring about the discharge of persons whom we denounce as un-American. They have said that themselves. Mr. Dies has stated half the evidence they brought in was illegally procured.

I propose to show that the purpose of this committee is not looking to un-American or subversive activities, but that the purpose is to frighten people and frighten people from taking a stand for progressive forces in America.

We had a horrible example of that recently, where the former Vice President of the United States was to address a meeting, and this committee went into print, and they
 121 took upon themselves no legislative function, but a judicial one, in denouncing the Southern Conference for Human Welfare as a communist organization. They said they would have spies there taking the names of persons attending meetings, so as to frighten Govern-

ment employees. That is not aimed at subversive propaganda; it goes far beyond that. These people didn't know at the time it wasn't a communist meeting, but they made certain it would prevent them from signing a petition or figuring in any progressive movement, or taking their stand with the progressive forces because people will be afraid of being denounced as communists.

When we are speaking of names, the committee had Robert Taylor, a moving picture actor, before them a while ago, and I recall he said he was coerced into making a picture he didn't like. I don't recall them asking him what his right name was, or other professional people what their right names were, but when they called Eugene Dennis, who has lived and worked under that name, and lived under that name for years beyond his own memory, the first thing they did is pick on him for that.

I expect to show to the jury that their purpose was evil and to hamstring and crucify him.

They did that before they granted his request to come to talk. They said they would allow no communist or any adherent of communism to speak. They decided to get Dennis down there. This was a good way to
 122 get him, and we will take care of him after he gets here, and they started in on that.

I expect to show in support of my argument that this committee is a gross conspiracy. I expect to show what they did in the way of villifying the former Vice President, what they did to Mr. MacLeisch, and Professor Dewey, what they did Bishop McConnell, what they did to Albert Einstein, Chester Bowles, David Lilienthal, and former Governor Benson, and Paul Robeson, and what they have been doing to people like that, and to Sinclair, and even to poor Shirley Temple, when she grew up.

Now, I expect to show that part of their conspiracy is to stamp out every progressive movement in the United States. They have denounced the Congress of Industrial Organization, the Civil Liberties Union, which for years

has borne an honest name, and they have villified the National Catholic Welfare Conference.

The Court: Mr. McCabe, the objection was based on your statement of what you would show in a letter, and apparently both Mr. Fihelly's argument and your argument have gone beyond that.

Mr. McCabe: I think it passed that.

The Court: I want to hear your argument. How long do you think it would take you to argue these questions?

As I see it, basically it comes down to a proper construction of the word "wilful," doesn't it?

123

Mr. McCabe: I believe so.

The Court: If wilful means only intentional or deliberate and not accidental or inadvertence, none of these matters, as I see it, would be relevant. If it means with evil purpose, then all of it could properly be. I think we ought to get down to that point right now.

Mr. McCabe: That was my reason for going on with the rest of my proposed opening to the jury.

The Court: I do not want to foreclose you.

What do you think about it?

Mr. Fihelly: You have to ultimately decide that question, anyway, and it should be decided at the beginning of the case.

The Court: How much time will it take to discuss it? I think I should excuse the jury today and the witnesses. I see Mr. McCabe there with a brief.

Mr. McCabe: That is not a brief. It is just a statement of it.

The Court: I know, but I think that there is some diversity of viewpoint.

Mr. McCabe: I don't want to curtail my argument. I would agree, and it would suit me personally at the time if we were to excuse the jury and start fresh tomorrow morning.

124

The Court: I would like to utilize a little more of today.

Mr. McCabe: We can go on with this today.

The Court: Do you both agree that this objection basically gets down to my decision on the word "wilful"?

Mr. McCabe: I think it goes further than that. I think we are still entitled to argue here with respect to the introduction of evidence and so forth. It may be premature now, and on the question of the constitutionality of the committee. There are many other points that would not come into my opening to the jury.

The Court: That would not come in.

Mr. McCabe: No.

The Court: You would raise that on your motion for judgment on acquittal.

Mr. McCabe: And on my objections to the introduction of testimony.

The Court: Mr. Fihelly said that Judge Keech said that does not bar it. That does not mean it is not relevant. Only when it is not relevant is Mr. McCabe precluded from stating it. That gets down to whether wilful means intentional or whether it means with evil purposes.

Mr. Fihelly: I think this, your Honor: I think even under the broadcast definition of wilful, the letter that is written here should not go to any American jury.

125 The Court: That is on another ground.

Mr. Fihelly: Yes.

The Court: Would you object also on the ground of any other testimony of the character he has indicated?

Mr. Fihelly: Of the general character; yes.

The Court: I assume your position is that wilful means intentional.

Mr. Fihelly: Yes, but I say that wilful means a broad definition is given to it, but that letter goes beyond the bounds of wilfulness and should not go to the jury.

While counsel is on his feet, he misread something that Mr. Justice Keech is supposed to have said on the last page.

The Court: Well, I am going to give you plenty of opportunity on it. I want to know whether the jury should not be excused and the witnesses.

Mr. Fihelly: I think it would be a good thing to do.

The Court: We can take up the other questions, as well as the narrow question on the admissibility of the letter.

Mr. Fihelly: I think the word wilful is not good answer to the objections we have to the letter. This is saving time and it is orderly.

The Court: Bring the jury in and also notify the witnesses, Mr. Marshal, that they are excused and to return tomorrow morning at 10 o'clock.

(Thereupon the jury returned to the courtroom at 3:05 p. m.)

126 The Court: Members of the jury, counsel have several questions of law to take up with the Court and they will probably take the balance of the afternoon, and for that reason I am going to excuse you until tomorrow morning at 10 o'clock.

Now, I want to admonish you not to discuss this case with anyone, not to allow anyone to discuss it with you, and not discuss it among yourselves. Also I wish to admonish you not to read anything about this case in the newspapers or listen to the radio at all during the time this case is on trial.

Now, I expect you as conscientious, intelligent jurors to obey my instructions and not to allow anyone to discuss this case with you, not to discuss this case with anyone, and not to discuss this case among yourselves until it has been submitted to you at its conclusion and you are in your jury room; and also not to read anything in the newspapers about it and not listen to the radio at all, because if you listen to the radio, you might hear something before you can turn it off.

Anything further, gentlemen?

Mr. Fihelly: Your Honor, we might make this suggestion, which is probably a good one in view of what has

happened recently. I think the jury ought to be instructed not to address any questions of any nature whatsoever to any of counsel. We have had two such instances, probably done innocently, and they only result in mistrials.

The Court: Yes. You should not address any questions to any counsel in this case about any matter whatever. If anything occurs to you which you feel is necessary to be discussed, you make the request to the Court and the Court will take appropriate action.

You are excused now until tomorrow morning at 10 o'clock.

(Thereupon at 3:10 o'clock p. m., the jury left the courtroom.)

The Court: Have you excused the witnesses, Mr. Marshal?

The Deputy Marshal: Yes, sir.

The Court: Now, Mr. McCabe, you may resume your argument and broaden it to cover the other points.

Mr. McCabe: I was looking through the bill of particulars I have. It sounds like an indictment of the Committee of Un-American Affairs, and I was trying to pick out the headlights, particularly on the gravamen of our attack on the committee as an un-American conspiracy, and what we believe was the underlying purpose of that committee, to control thought, and through controlling thought to control the activities of the American people. For instance, I have been engaged in what I consider were activities for civil liberties, and I have seen already the result of the activities of this committee that we are lacking now and will lack ten years from now in the ranks of fighters for progressive legislation the support of those young men who should be with us if they were exposed to the ideas that we consider the highest type of Americanism. They will be insulted. They will be afraid to buy a ticket or go to a meeting or be seen with anyone who has the slightest taint of progressiveness.

In the eyes of this committee, the expression "New Deal" has taken on all of the opprobrium that the Nazis and the common enemies in the last war had. It has gotten to be a scandal to call a person an adherent of the New Deal philosophy, and the committee has condemned it, and that is the purpose of this committee, and I don't think they got that out of their heads.

The Court: How does that become relevant in this case?

Mr. McCabe: It is relevant in this manner: that this was really a leading of Dennis, or a mouse trap job, to use football talk, for the purpose of allowing him to testify about matters that were considered to hamstring him, and through hamstringing him to prevent the man from opening his mouth against their legislation.

The Court: You know the line of authorities, that the point is not relevant.

Mr. McCabe: I think I know the line of authorities. It comes back to wilfulness.

The Court: Wilfulness means intentional or with bad purpose, and the bad purpose is the purpose of the defendant, as referring to Mr. Dennis.

Mr. McCabe: To absent himself wasn't for bad
129 purpose but for self protection. Suppose he had been advised that the members of the committee had, let us say, a goon squad there who were going to beat him up physically with clubs. Do you think his failure to appear could in common sense be considered a wilful failure? So is he subject to indictment for thinking that possibly physically he was in danger?

That may sound absurd, but the moral beating and the moral beating which the committee attempts to subject him to is set forth in the letter. He said: I came there in good faith. I was not allowed to tell it but I was hamstrung. I was scared with fear, and therefore on the advice of counsel I was holding the committee is illegal, and I do not propose to subject myself to the mental and moral beating any more than to the physical flagellation.

I think that should go to the jury, and he stands indicted through that, and we have a right to show it.

I could start to get up a memorandum, and I would be glad to work on it tonight if you would take a few minutes in the morning to consider it. I think I have a right to do that. I think if Your Honor feels differently, that we should find some way to get my offer of proof, or offer or opening, on the record so as to protect it and so as to avoid any danger of a mistrial through my trying, and I would not try it if you told me not to. I have too much respect for this Court and the manner in which the Court has

thus far conducted the trial to attempt to do anything like that, even though I were so inclined. We

should have clear in advance any statement and narrow the issue down, and we will now have to protect our record and proceed that way. I don't know what else there is.

The Court: There are quite a few authorities on this point. I have been interested in it from time to time. If you care to discuss them tomorrow, I will hear you.

Of course, there is the Townsend, and that has a great many cases cited, and then there is the Murdock case. I assume you are familiar with them.

Mr. McCabe: I am familiar with the Sinclair case and the Murdock case, all of those.

The Court: Is there anything more than those cases that you can offer?

Mr. McCabe: I do not know what associate counsel may have dug out.

Mr. Brodsky: I can get something between now and tomorrow morning, so you will have it complete.

Mr. McCabe: That is the reason I ask for an adjournment.

The Court: I will hear Mr. Fihelly now.

Mr. McCabe: I would like to say that Mr. Fihelly had the thought that I had misquoted Judge Keech, and I have pointed out that my copy is the same as his. I think

our difference was as to the application of it rather
131 than the correctness of the quotation.

Mr. Fihelly: I will explain what it is, and it was incorrect as far as just what Justice Keech said.

On page 8, under the heading 5, "Counsel for defendant attacks the indictment on the ground that it fails to show compliance with Section 194 of Title 2, United States Code. This is a matter of defense. In re Chapman, 166 U. S. 661, 667."

They had attacked the indictment because we did not show that the Congress had cited to the United States, or certified to the District Attorney the contempt citation.

In the Chapman case, we did not have to because that is a matter of defense. Now, the citation the United States Attorney got did not have this letter in it at all, or Justice Keech did not say it was.

The Court: Do you take the position, Mr. Fihelly, that wilful means with evil purpose, and evil only by this letter, as far as it is inflammatory?

Mr. Fihelly: My position is, first, that the word wilful is defined in the Townsend case as intentional or deliberate and not unintentional or inadvertent. As counsel for the defense knows, in the Murdock case, it is a felony involving moral turpitude. You have to show evil intent.

In other words, the definition may be intentional and
132 deliberate.

This letter should not go in and it should not go to the jury.

In the Townsend case the situation is factually the same. Townsend appeared before the committee, and there came a time in the course of the committee proceedings when he felt that the committee was intimidating him, or provocative, and he said: Goodbye, gentlemen, or good day, I am not going to stay any longer. He tried to enter a defense, the same thing counsel sets forth, that this committee had done this over a time, and they had not been fair, and that they were improper in their conduct, and

hostile, in almost the exact words that Mr. McCabe mentioned.

The lower court ruled out this defense, and the Court of Appeals upheld the decision and upheld the ruling of the lower court and held that was not a matter of defense; that Congress had the right to examine witnesses, and it was not up to the individual to say that the committee is hostile, I am not going down there, and that that constituted wilful default.

The case went to the Supreme Court: Certiorari was petitioned and the certiorari denied in the Supreme Court. There was a dissent in that case; Mr. Justice Stevens wrote a dissent in the Court of Appeals.

Generally there is a distinction between a misdemeanor in the meaning of the word wilful, and in the felony, and the authorities state this: that you have to
 133 examine each statute as to the particular conditions under which the word wilful appears.

As the Court said, and this is from the Fields brief which I have before me:

"It is only in a very few criminal cases that 'wilful' means 'done with a bad purpose.' Generally, it means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law. *Townsend vs. United States*, 63 Appeals, D. C. 229, quoting Learned Hand, J., in 7 Federal 2d 605, 606:

"In statutes denouncing offense involving turpitude, 'wilfully' is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States vs. Murdock*, 290 U. S. 389, 394, shows that it often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.'"

The one case in point is the Townsend case. With reference to misdemeanor, the Townsend case is the only one fully in point, and Your Honor should follow it in view of the Townsend decision.

The Court: Mr. Fihelly, supposing the word means intentional and deliberate and not having bad purpose, and supposing a man is ill, would he be guilty?

Mr. Fihelly: He would not.

The Court: Why not?

Mr. Fihelly: Because of the fact he physically could not be there.

The Court: Suppose he was ill and he could travel if necessary, but it might jeopardize his health?

Mr. Fihelly: I would say he would not be guilty under those circumstances because he physically should not be there.

The Court: But he intentionally absented himself and deliberately absented himself.

Mr. Fihelly: He does not have to take his life in his hands to be there.

You do not have that situation here, Your Honor. This man was able to be there.

The Court: He said he could not come because he was afraid that he was being entrapped. That is what counsel stated.

Mr. Fihelly: There is nothing in the letter to show that he is entrapped. The letter shows he took the law in his own hands. Although he came down on March 26, he didn't see fit to come down the next time, and he then attacked the constitutionality of the committee, that 135-138 he asked two hours to give testimony before only eight days before that.

The Court: I would like you to think over those two questions for tomorrow.

I would like you to think over this one for tomorrow: How could a committee ever function if the witness had only to obtain a letter from a lawyer that the committee has been illegally organized, or the questions intended to

be propounded were beyond the scope of the resolution. If wilful means with a bad purpose, that is not very clear.

Mr. McCabe: I see what you mean.

The Court: Then the committee could not have gotten a witness to appear.

Mr. McCabe: If they determined the fact.

The Court: That would be admissible to show good faith.

Mr. McCabe: Yes. I will address myself to that point, Your Honor.

The Court: I would like to talk about that tomorrow from your side.

May I look at that letter, Mr. Fihelly?

Mr. Fihelly: Yes, Your Honor (handing a paper writing to the Court).

The Court: Could I take this upstairs?

Mr. Fihelly: Yes, but I have a copy.

Mr. Brodsky: That is an exact copy.

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PROCEEDINGS.

(The following proceedings were had with the jury absent from the courtroom:)

The Court: Will counsel in the case on trial come to the bench?

(Counsel for both sides approached the bench, and the following occurred:)

The Court: The clerk tells me that Alternate Juror, No. 14, Lloyd J. Streifuss, has something on his mind. He wants to see me. I think I had better bring him in and see what he has to say with you gentlemen present. Don't you think so?

Mr. Fihelly: Certainly, yes.

Mr. McCabe: Whatever procedure Your Honor thinks is proper is agreeable.

The Court: Let us see what he has on his mind.

Mr. McCabe: If Your Honor thinks it can be developed more adequately in private, that is for you to say.

The Court: No; I would rather do it before you. My only question was whether I should do it here or in my chambers, but I think it better be at the bench.

Mr. Fihelly: Yes.

The Court: All right. Both sides agree with me.

Mr. McCabe: Is there any possibility that witnesses or members of the press present might get some misconception about what the nature of the inquiry was if they were present?

140 The Court: They might, but I do not like to bring it out before everybody, when he says he wants to see me. Don't you think we can make whatever inquiry there is and then probably take appropriate action after we hear what his difficulty is?

Mr. McCabe: That is perfectly agreeable.

The Court (to the deputy marshal): Ask him to come in. You gentlemen wait up here.

I have been studying this overnight. I have read the letter and the briefs in the Fields case and also the other applicable cases, and so I have had basic training now.

Mr. McCabe: There is a very, very rough memo, Your Honor (handing a document to the Court).

The Court: That was not necessary, but, I will be very happy to have it.

Mr. McCabe: Mr. Freedman hammered that out in the small hours of the morning.

(Alternate Juror Streifuss approached the bench.)

The Court: Mr. Streifuss, will you come forward, please? I understand you want to see me about something. Could you tell me what it is in front of counsel?

Mr. Streifuss: Yes, indeed.

The Court: It is not something that would embarrass you?

141 Mr. Streifuss: No. It happens that this jury was sitting at the Barsky trial as spectators, more or less, and they heard, I think, this very argument

that we were expelled from the room for—the question of law as to whether the committee had the right to issue a subpoena.

The Court: Well, you do not know what this argument was about in here?

Mr. Streifuss: No, I did not, but I mean, from what he started to say, and the objection, and everything, I concluded that that was what it was, and I thought perhaps you ought to know that they sat in over there. They were held over there while the trial was going on and that jury had been excused while they were arguing this point. I thought perhaps it might have some bearing on the case and that you should know about it.

The Court: Yes. I am glad you told me.

Do you gentlemen have any comment?

Mr. Fihelly: No.

Mr. Brodsky: I would like to give it some thought. I will tell you very frankly why—

The Court: There is no prevention of thought in this case.

Mr. Brodsky: No; I do not want to prevent thought. I am fighting for it. That is why I want to get the letter in. That is an expression of thought.

The Court: This juror may never be called on.

142 Mr. Brodsky: No; he was not arguing about himself. He said the rest of our jury were present there and heard the argument on the very point that we are deciding as to whether they should or should not hear. That is what I gathered he is doing.

Mr. Streifuss: Well, if it had to do with whether the committee could or could not have the right to issue a subpoena—in fact, there were several analogies made in this particular case by the District Attorney, and that is all there was to it—I mean, Judge Keech's opinion that they did have.

The Court: Now, you have not talked about this case with any of the jurors, have you?

Mr. Streifuss: No, I have not.

The Court: But your recollection is that all or some of them sat in the courtroom?

Mr. Streifuss: All but two.

The Court: At the time that the argument you refer to was made?

Mr. Streifuss: Yes.

The Court: You may retire, and do not discuss with your fellow jurors what this was about.

Mr. Streifuss: Yes, sir. Thank you, sir.

(Mr. Streifuss left the bench.)

The Court: You may continue to give thought to this matter.

143 Mr. Brodsky: Let me give thought to this for a few minutes.

Mr. McCabe: Let me say, before I even think, I think the statement of the juror raises a very serious question as to the frankness of this jury and the members as they were called on voir dire, as to whether they had heard anything about this case. Now, it may be that they acted just as honestly in their own lights as this witness did in his light—

The Court: You mean this juror?

Mr. McCabe: As this juror did in his lights, but it seems to me that frankness would have required them to state that they were present, especially when I asked them if they had sat in another case of this sort. It seems to me that frankness would have required them to say, "No, we did not sit as jurors, but we sat as spectators in that case," and then permit me to proceed further to ask whether what they had heard would predispose them in any way.

The Court: Well, I have your views and if you at any time wish to make any motions, I will entertain them.

Mr. McCabe: Well, I certainly regret making any motion which would prolong the trial and inconvenience any of us. Yet I realize that our convenience is entirely a minor matter when it comes to the administration of justice, and for that reason I think I should move that this

144 jury be discharged and that a new panel be called of jurors who have not been exposed to any of the arguments which are pertinent to this case.

The Court: Do you oppose the motion?

Mr. McCabe: I did that without consultation.

Mr. Brodsky: That is all right. I wanted to convince you that that was the step to take.

The Court: He has done your thinking for you.

Mr. Brodsky: Yes.

The Court: All right, Mr. Fihelly.

Mr. Fihelly: I oppose it on this ground: The jury has been selected. They were asked no questions that they did not answer properly. Counsel asked if they sat in other cases. Certainly he could not mean anything else but that they were selected as petit jurors to try any of these cases. It develops that some of them were there during part of the argument. There has been no indication to show any bias on the part of any of the jurors from what they heard over there.

I think it is a matter within Your Honor's discretion, but I do not see any need or necessity for getting a new panel.

The Court: Well, I will deny your motion. I do not believe that the jurors should be put in cellophane. I do not think they can be, as a matter of fact.

Mr. McCabe: I was going to suggest, perhaps, a reading of the arguments in the transcript of the
145 Barsky case on that point might be informative.

The Court: Well, if that seems to be necessary, you can read them and bring to my attention what you think is pertinent.

Mr. McCabe: Thank you, Your Honor; and for the present the motion is denied?

The Court: Your motion is denied.

Mr. McCabe: And an exception granted?

The Court: Exception is allowed.

Now, you are concerned about what the press may think. Do you want to make any statement about that?

Mr. Fihelly: I think it would be better not to make any statement about it.

The Court: All right.

(Counsel resumed their places at the trial table, and the following occurred:)

The Court: Now, gentlemen, I will hear you further on this question of law that we were discussing yesterday.

The witnesses in the case will be excused from the room, pending decision on this matter.

Mr. McCabe: Did you wish me to go forward, Your Honor?

The Court: Pardon me?

Mr. McCabe: Did you wish me to continue?

The Court: Just as you wish.

146 Mr. McCabe: It does not make any difference to me. It was on Mr. Fihelly's objection to my opening, and I think he has already spoken. It does not matter which of us speaks first.

The Court: I will give you both ample opportunity.

Mr. McCabe: I will say this at the outset, so that Your Honor will know that I had in mind your suggestion that I direct my attention to the question whether under my theory of the law, the business—the legitimate legislative business—of a congressional committee could go forward if advice of counsel could be accepted and should be accepted as a reason for not testifying; and Your Honor suggested that advice of counsel could be procured in a very great many cases; that counsel could find a reason to advise a client that a question was either not pertinent or that the committee was improperly constituted.

My first answer to that is that subterfuge of that sort may be discovered; that the business of a committee would not be permanently prevented from going forward. It might be temporarily interrupted while a discussion was had or while the legal question was tested out, and I would agree that not in every case would advice of counsel be an excuse for not testifying.

I would simply say that where the inquiry becomes one of the state of mind of a witness who was refusing to testify, then advice of counsel is one of many other
147 considerations to be pondered by the deciding body.

The advice of counsel might very well in itself exculpate a witness from contumacy. On the other hand, it might just be part of a proceeding.

We have, then, two facets of that question: A, Is the advice of counsel incorrect? And that, of course, is the only case in which a witness should be held on contempt. He should be permitted, first of all, and I think it is a matter for a jury to decide, and I think the cases hold that, to show that he acted on advice of counsel; and he should be further permitted to show, as we intend to do here, that the advice of counsel was proper, that the advice was good, that he had a perfect right not to appear, and I think that is a matter which we want to show here.

Now, that, of course, is bound up with the question, and Your Honor put his finger on it when he said, "After all, aren't we concerned with the meaning, the weight to be attributed to, of the word 'wilful' in this statute?"

I point out, of course, first of all, that the statute under consideration has two main branches. One is that the person, having been summoned as a witness, and so forth, wilfully makes default; and then the other facet is, "or who, having appeared, refuses to answer any question pertinent to the question under inquiry"; and it is the latter branch of that statute which was under consideration in the Sinclair case. There there is no ques-
148 tion of wilfulness.

Now, I submit that, regardless of what meaning we attribute to the word "wilfully," we must, when we find it in a statute, give some meaning to it. We must consider that Congress acted deliberately. They had before them a statute in which they proposed to make two acts criminal—default in appearance; refusal to answer questions—and we must attribute to Congress a thinking on that subject that they meant something when they said

that the default in appearance must be wilful, but that in the refusal to testify no wilfulness is required.

Now, what that word "wilful" means in that statute is to be determined, and, as the cases have said, "wilful" is a word of many meanings, and it must be examined in the context of the act, in the evil which was sought to be remedied by the act.

Now, of course, Your Honor, I am not going to read law to Your Honor in that sense, because Your Honor has said you brought yourself up to date with the Murdock case, and I think that the Murdock case is still the law—I believe it is—and answers our question, because that was a case in which the very point that we are advancing—that is at the top of page 2 of my brief—

The Court: Yes; I have it.

Mr. McCabe: The very point that we are advancing was asked in a request for a charge, that they were
149 given in good faith based upon his actual belief.

You should consider that, not that that is determinative, but that is a matter for a jury to determine. Of course, the Supreme Court held that that was right. Now, no other case has diminished the effect of that.

The Townsend case, which was cited from memory by both of us yesterday—and I must confess that my recollection of the Townsend case was pretty, pretty hazy—brings us to the exact point that we have.

May I borrow that for a moment, Mr. Fihelly?

Mr. Fihelly: Surely (handing a volume to Mr. McCabe).

The Court: Is that the Townsend case, now?

Mr. McCabe: Yes. I would like, first of all, just to read from the end of the first paragraph on page 360, three-fourths of the way down the page, in which the court there stated:

"The question to be decided was the state of mind of the appellant at the time he left the hearing."

Now, that case, of course, considered carefully the use of the word "wilfully." I think it starts off by saying

that very often it means, as the Murdock case and the other cases have said, and as "Words and Phrases" would say, it ordinarily imports some evil intent; and I think what throws us off in our considerations is the use of the words "evil intent," because to most of us that
 150 imports a deliberate planned evasion of the law; and that word seems to require that the word "wilfully" means more than it need mean in order to maintain our position.

I think that we are in a field in between two boundaries, the one in which the statute makes an act evil and criminal, regardless of intent. Good examples of those acts are the acts under the police power for the protection of public morals and public decency; such an act, for instance, making it a criminal offense to sell intoxicating liquor to a minor. The cases have held there that the man who, having been granted a privilege of selling liquor, sells it to a person, even though in his mind it was not doubtful, even though he appeared to be 30 years of age, if it later developed that the person was actually a minor, he is guilty of the offense, regardless of good faith, regardless of any inquiry which he may have made; that the evil which the legislature had intended to defeat was the actual passing over or selling of liquor to a minor, regardless of the circumstances.

Now, in the other boundary, part of the enclosure, you have the statutes which use the words "wilful" and "malicious." Obviously, in order to render an act malicious, it requires a great deal more than to render it wilful.

Now, in there you have a field in which cases can be cited in support of almost any position, and they are set
 151 forth in the Townsend case at page 357, in the second column.

The Court: I have the D. C. Reports. You are reading from the Federal Report?

Mr. McCabe: Yes. Let me see if I can get it.

The Court: That is all right.

Mr. McCabe: It is about the fourth page, in here, of the report, and the one which starts off, " 'Wilfully' has been defined by the Supreme Court"—

The Court: I have it.

Mr. McCabe: There is a long list of cases, and the writer of the opinion then says:

"It will be seen that the court has ascribed three general meanings to the word 'wilful.'¹⁰"

The court there does say:

"It is only in a very few criminal cases that 'wilful' means done with a bad purpose"; and there again I think we run into a little danger in saying that in considering the use of that word "bad" and "evil" should be considered.

Now, then, at the second paragraph down—

The Court: You contend that the word "wilful" means to include with a bad purpose or in bad faith and that therefore evidence of the character you indicated yesterday is relevant?

Mr. McCabe: I believe the justification may be advanced.

The Court: You contend that bad faith or bad purpose may be shown—

Mr. McCabe: Yes.

The Court: —as included within the meaning of the word "wilful"?

Mr. McCabe: Yes.

The Court: Bad faith and bad purpose?

Mr. McCabe: Yes. I think that might—

The Court: In other words, good faith and a good purpose would be a defense; is that correct? Is that your contention?

Mr. McCabe: Let me see. ~~Good faith I think would be a defense to a charge of violation of this act.~~ I think the justification may be shown. I think it comes down to what the Court said, that the state of mind of the man is to be what is to be determined and that was to be determined by a jury.

The Court: Let me get you straight. In other words, if I adopt your view, I would have to instruct the jury that one of the elements of the offense would be that his failure to respond to the subpoena, if they find that he did fail to respond to the subpoena, duly served, was done in bad faith and with a bad purpose; is that correct?

Mr. McCabe: Well, I am just wondering whether we cannot split that up. Do we have to go into another definition of "bad purpose," and if we go back into his mind, what to many of us might seem a bad purpose
153 might have seemed to him a good purpose.

The Court: Then you would limit it to bad faith?

Mr. McCabe: I think either one.

The Court: Then you would want it in the disjunctive; is that it?

Mr. McCabe: I think it should be in the disjunctive.

The Court: Then the element would be this: that the jury would have to find before a conviction was justified that the defendant failed to respond to a subpoena, duly served, if they find that he did fail to respond, in bad faith or with a bad purpose?

Mr. McCabe: Yes.

The Court: I see. I just wanted to get your view on that.

Mr. McCabe: Of course, otherwise in this case there would be no function for a jury, because there is no question of his failure to respond. I think we have that.

Now, I go further in this case, and I say that we are entitled to show to a jury to make sure that they would have in their minds every element of the case, not only the reasons which he gave as showing good faith on his part, but that those reasons were accurate, those reasons were correct.

It is not a question of having to depend on the weaker of the two contentions. "Well, I made an honest mistake. My lawyer gave me bad advice. I believed
154 it, and I acted in good faith. If I am convinced

that my lawyer was wrong, then I will purge myself of this contempt."

We go further than that and say we are entitled to show and have a jury find that the advice of counsel was correct, that this committee had no legislative purpose, that it was unconstitutional, that it was not a committee of Congress, because of the fact that it consisted of persons—at least one person—who was not legally a member of Congress. We are entitled to have a jury pass on all that as going to the question of whether or not our default was wilful.

I see the Townsend case also cites the Reynolds case:

"The Supreme Court has also held—perhaps on the theory that wilfulness is a type of specific intent—that where the crime involves wilful intent, an accused may show justification by proving that he 'honestly and in good faith seeks advice of a lawyer as to what he may lawfully do' * * * and fully and honestly lays all the facts before his counsel, and in good faith and honestly follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful * * * even if such advice were an inaccurate construction of the law * * * In *United States vs. Murdock*, supra, the Supreme Court has extended this exception to the general rule even farther as applied to the particular facts of that case. There the court said: 'Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy or the records he maintained, became a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be wilful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.' "

That also answers Mr. Fihelly's suggestion of yesterday that one of the differences in the treatment of the

word "wilful" lay in its application to a felony or a misdemeanor. The Murdock case was a misdemeanor case. The Speiss case related to a distinction between a felony and a misdemeanor.

In the Speiss case they repeated the phrase, "Wilful may be a word of many meanings and must be studied from the context."

I say in this case, particularly where a committee has been conducting meetings over a period of eight years, that the determination of whether or not a witness was acting on good advice of counsel, the determination of whether or not he was contumacious, might well await the event that he might be allowed to argue it out, not under the threat of a sentence to imprisonment. An indictment is not the way to take care of a situation like that, where a person states he is acting under advice of counsel.

156 seems to me the proper way is to thresh that out in another court than in a criminal court.

Mr. Brodsky has reminded me of something we discussed last evening, which I think is pertinent. Supposing—this may be a far-fetched supposition—that Mr. Fihelly said, "Well, now, there is no necessity for your going ahead and proving that this committee is not a proper legislative committee. There is no necessity for proving that it is unconstitutional. I will concede that this committee was unconstitutional, and still I maintain that this defendant is subject to the sanctions of the statute."

Now, would Your Honor say that, if Mr. Fihelly conceded that, "I will admit here of record, I will stipulate, that this committee is not a constitutional committee," or would Your Honor have any other action to perform except to dismiss the indictment or to enter a verdict of acquittal? I cannot conceive of any other action which Your Honor would take.

Now, instead of Mr. Fihelly's conceding it, we ask leave to prove it, and I think if we can prove a fact which if conceded would lead directly to a directed verdict of

acquittal, that answers the question of our right to prove it.

Mr. Fihelly: If the Court please, counsel have already argued that very point before Mr. Justice Keech in the motion to dismiss. Now they want another bite at the apple.

To give the interpretation that defense counsel want in this case to this statute is not only to distort it but to
157 defeat the very purpose of the statute.

You have here an homogenous statute passed by Congress to give Congress the same power to punish contempt that the federal courts have. True it is that the word "wilful" appears in the first part and it does not appear in the second, and there is a reason for that. The reason that "wilful" is in the first part is that it applies to the word "default"; and that is why I answered as I did to Your Honor's question propounded to me yesterday. You asked about a man being ill.

All right. You cut it down. Suppose it would impair his health substantially? You cannot say whether it is a wilful default until you investigate. In connection with contempts in a federal court, you go into the same matter of inquiry. If a subpoena is put on the witness does not respond, you do not send the marshal out to get him in jail. A reasonable inquiry is made, and time after time the court will say, "Have you learned that this witness is ill? Wait until he recovers and we will have a hearing on the matter."

So, in answer to the question that Your Honor propounded, that is why the word "wilful" is in the first part.

Was it done deliberately? Was it done intentionally? In order to be in contempt of a federal court, you do not have to have an evil intent or a bad purpose. If the thing was done deliberately and intentionally, that is sufficient; and that is the same test that the committee
158 of Congress intended to have and is entitled to.

Now, I am not going to quote from any cases, because Your Honor has read them. The Townsend case held,

in connection with a wilful default, that all that was necessary was that it was deliberately done and intentionally done, not that there had to be an evil intent or purpose.

The Sinclair case said, in connection with the second part of the statute, "He deliberately refused to answer those questions." He had gotten advice of counsel; but they said that was not a defense. It was not necessary that there be bad faith. It was not necessary that you show an evil intent or purpose; but he deliberately refused to answer the question.

The same test the Townsend case gave for the first part of the section.

Now, you have an homogenous statute here. You have one thought and one reason running through it, and you cannot have an interpretation for one part that is going to defeat the other, and you cannot have an interpretation for one part that is going to give a defendant immunity and make him greater than the committee that seeks to question him.

Under the theory that the defense counsel have, any individual can make himself superior to the committee and defeat and frustrate its purpose. The theory and purpose of the legislation, of course, was to enable
159 the committees to investigate and to get data on which to legislate. A lot of data they would get if you had the test that defense counsel want in this case!

As we stated in the Fields brief in the Court of Appeals, Your Honor, there is no substantial difference—and I again point out the one running thought, the inherent thought, in the statute—between sending a subpoena out to produce records and the individual's coming in and being questioned with respect to that general matter or with respect to those records.

What an absurd situation you would have in those two situations if you took the test and gave the interpretation to the statute that defense counsel want here.

Let us take the old situation you had in the McCracken case, where a subpoena duces tecum is sent out for some contracts in connection with aviation matters, say. The defendant does not bring them in. All right. The committee wants to question him with respect to certain matters covered by this general subject, although he did not respond to the subpoena duces tecum. He refuses to answer the questions.

Defense counsel would say, with respect to the first, that you could show good faith. With respect to the second part, you could not show good faith. You would have a different test on one part of the statute than you would have for the other, which is most absurd and ridiculous, when you stop to think of it.

And when you stop to think also, Your Honor, of the various matters that could come in under the question of good faith, again you see how impractical it is. They can attack the resolution as being illegal. They can say the records requested are not pertinent. They can say that the committee is hostile, as Townsend said in his case, and which the Court of Appeals overruled. They can say that the committee is motivated by political and other sinister motives. Why, you really come down, when you let the individual do that, to instead of considering him for default and for being in contempt of the committee, trying the committee itself.

We are not trying the Dies Committee here. We are not trying any Committee on Un-American Activities here. These red herrings that are run across by defense counsel—and you would have hundreds of them if you take the test they want for the statute—are to let the Court and the jury forget, that instead of the defendant being tried, the committee should be tried.

I also want to say that not only in the Sinclair case did the Court hold that advice of counsel was not a defense, but it was called to my attention last night by Mr. Murray that in the Barsky case, Mr. Justice Keech held the same

thing, and called to Mr. Rogge's attention, in making
 161 his opening statement, that he was so holding, and
 I read from volume 2 of the stenographic proceedings in that case:

"Mr. Rogge: But nevertheless and pursuant to that document, Miss Helen R. Bryan consulted counsel, and counsel, after examining into it, told her, among other things, that the resolution creating the House committee was unconstitutional."

"Mr. Murray: Mr. Rogge, I am compelled to interrupt.

"Your Honor, I am fully prepared to object to this very thing. I didn't understand that it was agreed that that was to be stated."

And I may say that Mr. Rogge's opening statement was written up, was given to the Court, after one objection was made, and Mr. Justice Keech deleted certain parts from it, including this part in connection with seeking the advice of counsel.

"The Court: I agree with you, Mr. Murray. That was not part of it, Mr. Rogge."

"Mr. Rogge: I must say to Your Honor that I understood that the part about consulting counsel, Your Honor did not take out. I did not understand Your Honor to rule on that."

"The Court: Well, sir, you are misinformed, sir. I did."

And so we say that the logic, the reason, and the purpose of this very statute calls for the only interpretation that can only reasonably be given to it, the one
 162 given in the Townsend case, the one given in the Sinclair case, that it is done deliberately and intentionally and that it was not inadvertent and accidental.

Mr. McCabe: I would like to be heard for just a minute, Your Honor. Mr. Fihelly said it would be ridiculous to read the statute so that it would be interpreted one way as to one part and another way as to another. Congress

apparently did not think it was ridiculous. They made this distinction. - We simply argue that distinction.

Congress deliberately put the word "wilful" in one place and omitted it in the other.

Now, again as to the Townsend case, and I do not want to harp on that too much—

-- The Court: The what case?

Mr. McCabe: The Townsend case, the Circuit Court of Appeals apparently thought well of our argument. They did not dismiss our argument at all. They did not disapprove of the suggested charge in the Murdock case. In fact, that very charge had been given by the District Court in the Townsend case, which says:

"Moreover, the Court of Appeals observes, the Townsend request for instruction, in the light of the Murdock decision, was granted by the District Court," and quotes that request.

All this that we have been quoting from in the Townsend case is more or less dictum, because the issue
163 there was that Townsend did not make any attempt to offer evidence to show that the committee was not a legislative committee. His argument was not that it did not have any legislative purpose. His argument was that it was hostile; and I think we can agree that a witness cannot always expect a friendly inquisition. Very often, of necessity, the inquisition has aspects of hostility; and that certainly is not excuse.

But Townsend did not offer to show what we offer show here, and I think that a reading of the Townsend case will show that if Townsend had offered proof of the non-legislative purpose of the committee, his testimony would have been admitted, and perhaps the case never would have gone up on appeal.

Now, we are offering to show by this letter the belief of the defendant that the committee was an improper committee, that it had no constitutional right to subpoena him, and we are offering to prove by other testimony that

that belief was correct. I think we are entitled to show that.

The Court: Is there anything further, gentlemen, that has occurred to you in looking over these papers?

Mr. McCabe: It is suggested to me that one of the arguments is whether or not there was a separate test in that act. The test in the first part is wilfulness, and the test in the second part is the pertinency of the testimony concerning which a person was to be questioned—that is, having appeared, then the question is not his wilful refusal, but his judgment as to the pertinency of the question—and it was regarding his judgment as to the pertinency of the question asked that the court in the Sinclair case held that he has to take his chance on that. That is the only thing that occurs to me.

The Court: Have you anything further?

Mr. Fihelly: None, Your Honor.

The Court: Gentlemen, I have had occasion, as I stated to you at the bench, to read the pertinent cases overnight; and I have also this morning considered the briefs submitted by counsel for the defendant and I have had the advantage also of argument made by counsel this morning, as well as yesterday.

I am of the opinion that the word "wilful" as used in this statute under consideration means intentional and deliberate, that is, an act that is not accidental nor inadvertent, but intended with deliberation. In this view I am supported, if not controlled, by the Townsend case.

This construction, in my judgment, is also the practical, sensible construction of the word in question. A broader construction which would include the word to mean in bad faith or with a bad purpose, as contended by the defendant's counsel, would in practice nullify the sanctions for compulsory attendance of witnesses before congressional committees. Under such a construction an unwilling witness would need only to say, when he is put to trial, that upon advice of counsel he believed the committee to be illegally constituted or that

the inquiry was beyond the scope of the creating resolution. Upon such a showing and upon an instruction to the jury that good faith or absence of bad purpose constituted a defense, a defendant would inevitably escape punishment, and a committee could never obtain the testimony of an unwilling witness.

I realize that this ruling would include a person who absented himself on account of illness, legitimate illness. In order to be logical, I must assume that this would be a violation of the statute. But technical violations of the criminal law are not unique and, under our system, reliance on such cases must be placed on the sound judgment and the sense of fairness of the prosecutor to prevent injustice.

Of course, if that is not adequate, there is the additional safeguard of the grand jury, and finally the safeguard of the court.

Now, this ruling came about by reason of an objection by the District Attorney to a reference to a letter in the opening statement to the jury of defendant's counsel. This letter was handed to me last evening, and I have had an opportunity to read it, and I shall now ask
166 the clerk to mark it Defendant's Exhibit 1 for Identification, so the record will be clear.

(Letter was marked Defendant's Exhibit I for Identification.)

The Court: I sustain the objection of the District Attorney to a reference to this letter in the opening statement of defendant's counsel. Defendant's counsel will also make the rest of his opening statement conform to the pattern of this ruling. I suggest, however, that in order that the defendant's record may be made glaringly clear, when the proper time comes he may tender the evidence which he feels is admissible, at the bench, and then the Court will have an opportunity to rule on each item as the item is tendered.

Exception is allowed to this ruling.

Mr. Marshal, will you ask the jury to return?

Mr. McCabe: If Your Honor please, might I ask whether, in view of the fact that I was in the midst of making my opening address, I should not make my proffer of a written transcript of the matter which would be contained in my opening address?

The Court: To be inserted, you mean?

Mr. McCabe: Yes.

The Court: No. I had in mind—

Mr. McCabe: So the matter which I am prohibited from saying at this time may also be a matter
167 of record?

The Court: Of course, I do not know what you have. If you have it written out, I shall be glad to examine it.

Mr. McCabe: We had eliminated some, Your Honor. Suppose I mark off, if you do not mind—

Mr. Brodsky: They are marked off.

Mr. McCabe: I will mark that off.

The Court: I am unaware of the practice of censoring opening statements by counsel, Mr. McCabe. I prefer you to proceed with your opening statement, making it fit the pattern which I have outlined to you, so far as you conscientiously believe it does; and if you get beyond it, then the District Attorney will make an objection, and I will rule on it. That is the way we usually proceed here. I do not care to go over your opening address which has been written out, I assume, in rough—

Mr. McCabe: Well, it is in pretty good shape, but I appreciate that Your Honor has enough duties up there without acting as censor, and I think that I might very well solve that problem by reserving my opening statement. Having started my opening address, if I may now reserve the remainder of it until the conclusion of the Government's case—

The Court: You may. I will permit that, and I will inform the jury accordingly, that you desire to defer your opening address, the rest of it, until the conclusion
168 of the Government's case.

As I suggested to you, you can make your record very clear by tendering the proof item by item at the bench and getting a ruling on it.

Mr. McCabe: Yes. Thank you, Your Honor; and that question will also come up, in order to avoid any possibility of mistrial, I presume, in the matter of, perhaps, cross examination of some of the witnesses?

The Court: Yes.

Mr. McCabe: And I will do my best to make my offer at side bar.

With reference to the matter we were discussing before, Your Honor, Mr. Fihelly has very kindly permitted me to look at the second volume of the certified record in the Barsky case, and while it is a little difficult to say just what was said in open court and what at side bar, I thought I had found the place.

I should like to offer, in support of the motion I made at side bar, Your Honor—the last motion which I made at side bar—

The Court: At the time that Juror No. 14 came to the bench?

Mr. McCabe: Yes. I should like to offer the contents of the certified record of the official court reporter, proceedings before Justice Keech, on Monday, June 16, 1947, in the matter of United States vs. Barsky, 169 et al., Criminal No. 368-47, particularly pages 190 to 195.

The Court: Let me see it.

Mr. McCabe: Will Your Honor indulge me just a minute until I see whether there was something before they came to side bar?

The Court: Let me have that.

Mr. McCabe: I will catch that again. I think Your Honor would want to see where they came to his opening remarks on behalf of defendant, beginning at page 112 and at 129, after the opening remarks had proceeded to there.

After objection by Mr. Marray, they were called to the bar of the Court, and then the proceedings, everything that was said there, was probably in private, until they came to page 190.

(A document was handed to the Court.)

The Court: Any objection, Mr. Fihelly?

Mr. Fihelly: No, Your Honor.

The Court: It will be received.

Mr. McCabe: If Your Honor please, you have been most considerate of me in allowing me to protect my own record in my own way. I said I thought the solution of my opening statement might be to withhold it until after the Government's testimony.

I would like to reconsider that, Your Honor. I would like at this time to make a proffer of the 170 material, make a written proffer of the material which I propose to state to the jury as to the elements of proof of the defendant's case.

I would like to have that marked. It is in typewritten form, and I have noted on it a number of paragraphs, and I have eliminated from it paragraphs number 16, 17, 34, and a designated portion of paragraph 46. I have eliminated all except the first sentence of paragraph 46, consisting of three and a half lines, and I would like to have that marked as Defendant's Exhibit No. 2 for identification.

The Court: It may be marked.

Mr. McCabe: So I guess I better make an offer of it.

The Deputy Clerk: Mark this one?

The Court: Mark that 2 and the other 3.

(Paper writings were marked Defendant's Exhibits 2 and 3 for Identification.)

Mr. McCabe: I would like to take exception to your—

The Court (interposing): I haven't ruled on your tender.

Mr. McCabe. Excuse me.

The Court: I shall give you opportunity to make a full and complete opening statement in behalf of your client. If you go beyond the pattern which I have outlined in my ruling, and there is an objection, I shall then rule on the objection. If in your opening statement you make offer of statements that are improper, and there
171 is objection, I shall rule on the objection.

I am not going to limit you to any particular opening statement, but I am going to permit you full and proper opportunity to make a complete opening statement for your client within my ruling.

Mr. McCabe: So that I may be guided and not say things which will leave Mr. Fihelly, perhaps quite properly, on his feet with objections, may I ask whether the ruling which Your Honor made restricts me from referring to the alleged unconstitutional status of the committee?

The Court: That is so vague I cannot rule on it.

If you wish to state in your opening statement that you are going to offer certain evidence, go ahead and make a statement to the jury. That is what the opening statement is for. You have to run your own risk of Mr. Fihelly's objections.

Mr. McCabe: Yes. That was about what I was doing when Mr. Fihelly did object.

The Court: And then I thought I heard you were taking up where you left off.

Mr. McCabe: Yes. I do not wish to be contumacious of Your Honor's ruling. I have an exception to the ruling.

Now comes my interpretation of your ruling and my interpretation of the opening speech, whether it is within your ruling or not, and I can see the possibility of
172 offending the Court/offending counsel, and calling for constant objections which may very well tend to confuse the jury and might lead to a motion for the withdrawal of a juror. For that reason—

The Court (interposing): You will not offend the Court if you conscientiously persist in a viewpoint that you have.

Mr. McCabe: I thought that would restrict me as to other points, as proffer of the points when the defendant is called to go forward.

The Court: I do not know. I am not going to pass on matters until they arise, Mr. McCabe. I do not give declaratory judgment, you know.

Mr. McCabe: Well, that may very well put me in the position of reading to the jury all that is written here.

The Court: If you think it is proper, you should do so.

Mr. McCabe: Well, now, some of it I feel, is covered by Your Honor's ruling, and Your Honor has ruled that that is not pertinent and I would not be allowed to prove it. I don't want to be forward in deliberately reading it.

I have already tendered it and asked it to be marked for identification, Has Your Honor ruled on the tender?

The Court: Of course, you may tender it. May I see it?

Mr. McCabe: Yes (handing a paper writing to the Court).

173 The Court: Do you have a copy, Mr. Fihelly?

Mr. Fihelly: No. I just asked him about it, Your Honor, and counsel is giving it to me.

The Court: Have you been through it, Mr. Fihelly?

Mr. Fihelly: I have just one more page to go, if Your Honor please.

I have been through it and I do not see a single paragraph that meets the pattern of Your Honor's ruling that would be relevant and material to be uttered and stated in an opening statement in this case.

The Court: After reading it, Mr. McCabe, I now understand your desire to tender it to me before you commence making these statements because I find that they are all objectionable, and I would have to sustain the objection

to all of them. Therefore, you will not be permitted to make such an opening statement.

Mr. McCabe: And Your Honor grants me an exception to your ruling?

The Court: Yes.

Mr. McCabe: I would like to offer it in evidence.

The Court: No. This is your tender. This is not your time to offer evidence. Your time to offer evidence to be received will be after the Government closes its case. This is your tender of the opening statement, as I understand it.

Mr. McCabe: Very well, Your Honor.

174 The Court: Is there any difference of opinion about that?

Mr. McCabe: There was in the back of my mind that the prohibition against the offering of evidence by a defendant did not apply to the opening statement. The defendant has a right to make an opening statement, and I thought—I appreciate what you said—in a desire to avoid confusion that I should rather address you as to my proffer, but as long as the ruling is made, and this is the only time the defendant would be able to proceed with the case before the conclusion of the Commonwealth's case, the logical consequence of his right to make an opening statement is his right to offer in evidence the proposed statement.

The Court: You Pennsylvania lawyers are not as persistent as District of Columbia lawyers. They continue to offer evidence as long as the case continues, if they feel in good faith it is admissible.

Mr. McCabe: I will offer it now, Your Honor.

The Court: At the proper time, you may offer the evidence. If you do not care to offer it at that time, of course, that is all right.

What are you offering?

Mr. McCabe: I am offering now a written proffer of proof to be incorporated in my opening statement. This is the statement which Your Honor has directed I may

not make inasmuch as it falls entirely without the
175 pattern of Your Honor's ruling.

The Court: The tender of proof will have to be made under my ruling after the Government rests its case.

Mr. McCabe: Your Honor grants me an exception to that?

The Court: Yes.

Bring in the jury. This is the time we usually take the recess, so we will take a five-minute recess. The jury can be brought in in the meantime.

(Thereupon a short recess was had.)

The Court: Bring the jury in.

Do you intend to make an opening statement or do you wish to defer it until after?

Mr. McCabe: I think I should make some explanation to the jury, having begun a statement, that I am reserving anything further at this time.

The Court: You make the explanation. I was not sure in view of your change of position what you meant.

Mr. McCabe: I may very well rest on my proffer or repeat it at another time.

The Court: You will be given opportunity to make such statements as you wish before the jury.

(The jury returned to the courtroom at 11:35 a. m.)

The Court: Very well. You may proceed, Mr. McCabe.

Mr. McCabe: Members of the jury, when you were sitting in the room, which is some considerable
176 time ago, I was taking advantage of the opportunity given to a defendant in a matter of this sort to make an opening statement after the conclusion of the Government's opening statement and before the beginning of the taking of testimony, so that the jury might have some idea in their minds as to what the defendant intends to proof.

You will recall that Mr. Fihelly made an objection to the line of discussion which I was initiating, and subsequently to that, after some discussion, it has been held

that certain things I was going to say were not proper to be said at this time, and therefore, I am not going to say anything more in the way of an opening statement, but with the permission of the Court I will reserve any statement I may have to make until the conclusion of the Government's case.

Mr. Fihelly: I ask these be marked, Your Honor, as Government Exhibits for identification numbers 1 to 7, inclusive, these documents.

The Court: The clerk will mark them, please, for identification.

After you have marked each one return it to Mr. Fihelly. (Documents were marked Government Exhibits 1 to 7, inclusive, for identification.)

The Court: Do you wish to make a tender, Mr. Fihelly?

Mr. Fihelly: I want to tender them all, but I was
177 giving counsel an opportunity to look at them.

The Court: I think you better tender one at a time.

Mr. Fihelly: I will be glad to do it. I offer in evidence Government 1 for identification, particularly page 19 of this document, which is a page from the Legislative Reorganization Act of 1946, which on August 2nd of that year brought the Committee on Un-American Activities into existence as a standing committee.

I will show by one of the next exhibits that all that was done in January, 1947, was to renew the life of that committee just by a blanket resolution.

The Court: Any objection to number 1 for identification?

Mr. McCabe: No objection for identification, Your Honor.

The Court: No?

Mr. Fihelly: I am offering it in evidence.

Mr. McCabe: Yes, there is objection. I have objection to exhibit number 1, which is simply a repetition of objections already made that the action of the Congress in renewing the Committee on Un-American Activities is

unconstitutional in that it does not provide standards, it does not provide for any constitutional activity on the part of that committee, and it does not set up standards by which the powers and the extent of the powers of the committee may be judged. I would like to repeat here the objections already made.

178 The Court: You are not making any objection on formal grounds?

Mr. McCabe: No; no objection as to authenticity or accuracy of the exhibit.

Mr. Fihelly: Does Your Honor want to look at this?

The Court: Yes.

Those objections were ruled on by Mr. Justice Keech?

Mr. Fihelly: That is right, Your Honor.

The Court: No additional objection?

Mr. McCabe: No additional objection, Your Honor.

The Court: The objection is overruled and it will be received in evidence.

Mr. Fihelly, you may read to the jury any part you want.

Mr. McCabe: Exception.

The Court: Exception is allowed to the defendant.

(Government Exhibit No. 1 for identification was received in evidence.)

Mr. Fihelly: Government Exhibit No. 1, ladies and gentlemen of the jury, as I stated is from the Legislative Reorganization Act, which is the Legislative Reorganization Act of 1946, and on page 19 as part of that Act states as follows:

“Committee on Un-American Activities. (A) Un-American Activities.

179 “The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda

as instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the Chairman of the Committee or any subcommittee, or by any member designated by any such Chairman, and may be served by any person designated by any such Chairman or member."

180 I have Government 2 and 3 to which there is no objection. I will pass them to Your Honor.

The Court: They will be received. Do you wish to read them to the jury then?

Mr. Fihelly: Yes, Your Honor. Government 2 and 3 have to do with Congress organizing, the Eightieth Congress, which began in January of this year.

(Government Exhibits 2 and 3 for identification were received in evidence.)

Mr. Fihelly: Members of the jury, this is Government Exhibit 2, House Resolution 2:

"In the House of Representatives, U. S., January 3, 1947.

"Resolved, that a message be sent to the Senate to inform that body that a quorum of the House of Representatives has assembled; that Joseph W. Martin, Jr., a Representative from the State of Massachusetts, has been elected Speaker and John Andrews, a citizen of the State of Massachusetts, Clerk of the House of Representatives of the Eightieth Congress.

"Attest: John Andrews, Clerk," and the seal of the House of Representatives is attached.

Government Exhibit 3 is with reference to the organization of the Eightieth Congress and refers to the document the jurors now have in their hands, Government No. 1, renewing the Committee on Un-American Activities, set forth in the Legislation Reorganization Act, which is No. 1.

181 This is House Resolution No. 5:

"In the House of Representatives, U. S., January 3, 1947.

"Resolved that the rules of the House of Representatives of the Seventy-ninth Congress, together with all applicable provisions of the Legislative Reorganization Act of 1946, be, and they are hereby, adopted as the rules of the House of Representatives of the Eightieth Congress, with the following amendments included therein as a part thereof, to-wit:

"Rule 5, clause 2, strike out 'Committee on Accounts' and insert 'Committee on House Administration.'

"Rule 13, clause 2, strike out 'clause 45 of Rule 11' and insert 'clause 2. A, of Rule 11.'

"Rule 33, clause 1, strike out 'the resident Commissioner to the United States from Puerto Rico, the resident commissioners of the Philippine Islands' and insert 'the resident Commissioner from Puerto Rico.'

"Rule 42, strike out 'Committee on Accounts,' and insert 'Committee on House Administration.'

"Attest: John Andrews, Clerk," and the seal of the House of Representatives is attached.

We offer in evidence Exhibit No. 4, which I will pass to Your Honor.

I understand that there is objection to it.

The Court: Just a moment until I read it, please.

Very well.

182 Mr. McCabe: The objection, Your Honor, goes not to the authenticity of the exhibit as a correct transcript of certain records, but it does go to the effectiveness of that exhibit as indicating the composition and personnel of a committee of Congress, that is, because of the presence of the name on that committee as a member of the committee of Representative Rankin, for reasons which are set forth in my proffer of proof and which I would be glad to repeat now if Your Honor cares to hear me.

It is our contention that Congressman Rankin, that Mr. Rankin is not a lawfully elected member of Congress, and therefore a committee which contains Mr. Rankin's name is not a committee of Congress, which must be composed of members of Congress, but is a mixed committee which has no authority.

The Court: The objection is overruled.

Mr. McCabe: We have an exception?

The Court: Yes.

(Government Exhibit 4 for identification was received in evidence.)

Mr. Fihelly: Government No. 4, ladies and gentlemen, is on the stationery of the House of Representatives, Office of the Clerk, Washington, D. C., and reads as follows:

"I, John Andrews, Clerk of the House of Representatives, do hereby certify that the following members constitute the Committee on Un-American Activities of the House of Representatives and is evidenced in the
183 Journal of the House of Representatives of January 14, 1947, and January 16, 1947:

"J. Parnell Thomas, Chairman, of New Jersey, Karl E. Mundt, of South Dakota, John McDowell, of Pennsyl-

vania, Richard M. Nixon, of California, Richard B. Vail, of Illinois, John S. Wood, of Georgia, John E. Rankin, of Mississippi, J. Hardin Peterson, of Florida, and Herbert C. Bonner, of North Carolina.

"In witness whereof I hereunto affix my name and the seal of the House of Representatives, in the City of Washington, District of Columbia, the 23rd day of April, anno domini One thousand nine hundred and forty-seven.

"John Andrews, Clerk of the House of Representatives," and the seal of the House of Representatives is attached.

I pass to Your Honor Government No. 5 for identification to which I understand there is an objection.

The Court: You are offering it in evidence?

Mr. Fihelly: Yes, Your Honor.

Mr. McCabe: Again, my objection is not to the authenticity of the exhibit as a correct transcript of certain proceedings, but it is objected to as irrelevant and prejudicial to the defendant in that inevitably a jury must ascribe to that statement some evidential value as to the guilt of the defendant. Perhaps that, of course, could be cured by Your Honor's statement that this document, just as an indictment offers no evidence but is only evidence of a certain proceeding

184 The Court: Do you offer it for any other purpose?

Mr. Fihelly: No; just to show the modus operandi.

The Court: I understand you to say, Mr. McCabe, that could be cured. You had objection but it could be cured by my statement?

Mr. McCabe: I did say it, Your Honor. While I think it is objectionable and may have a prejudicial effect, I think in the interest of orderly procedure and proof that I should say I believe Your Honor can cure it by caution to the jury.

The Court: Very well. Exhibit 5 is received in evidence, and the jury is instructed that they will consider

this exhibit not as evidence of the guilt of the defendant but only as showing the procedure and providing the manner to bring the defendant before the bar of this court.

(Government Exhibit 5 for Identification was received in evidence.)

Mr. McCabe: And the same objection goes to Exhibit No. 6, with the same qualification.

Mr. Fihelly: We will also offer that.

The Court: Exhibit No. 6 will be received, and the jury will understand that Exhibit No. 6 is received for the same limited purpose, not as evidence of the guilt of the defendant but as evidence showing the procedural matters.

185 Mr. McCabe: Not as evidence of the facts set forth therein.

The Court: Nor as evidence of the facts set forth therein, except as showing the procedure.

Mr. McCabe: That is correct, Your Honor.

(Government Exhibit 6 for identification was received in evidence.)

Mr. Fihelly: Counsel has the same objection to number 7, which we also offer in evidence.

The Court: Number 7 will be received with the same admonition to the jury and the same caution that I have already stated in respect to Exhibits 5 and 6.

(Government Exhibit 7 for identification was received in evidence.)

Mr. Fihelly: I shall read Government No. 5:

“House Resolution 193, in the House of Representatives, U. S., April 22, 1947.

“Resolved, that the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives, as to the willful, deliberate, and inexcusable refusal of Eugene

Dennis, also known as Francis Waldron, to appear before the said Committee on Un-American Activities in response to the subpoena served upon him on March 26, 1947, together with all of the facts in connection therewith, under seal of the House of Representatives to the United States Attorney for the District of Columbia, to the end that the said Eugene Dennis, also known as Francis Waldron, may be proceeded against in the manner and form provided by law.

"Attest: John Andrews, Clerk," and the seal of the House of Representatives is affixed.

I shall now read Government No. 6, which is on the stationery of the Speaker's Rooms, House of Representatives, U. S., Washington, D. C.

"April 23, 1947.

"The United States Attorney, District of Columbia.

"The undersigned, the Speaker of the House of Representatives of the United States, pursuant to House Resolution 193, Eightieth Congress, hereby certifies to you the wilful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron, to appear before the Committee on Un-American Activities of the House of Representatives conducting an investigation under authority of Public Law 601, Seventy-ninth Congress, and House Resolution 5, of the Eightieth Congress, in response to the subpoena served upon him on March 26, 1947, as is fully shown by the certified copy of the report of said committee which is hereto attached.

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this 23rd day of April, 1947.

187 "Joseph W. Martin, Jr., Speaker of the House of Representatives.

"Attest: John Andrews, Clerk of the House of Representatives," and the seal of the House of Representatives is affixed to the document.

I shall now read to you Government Exhibit No. 7, on the stationery of John Andrews, The Clerk.

"Office of the Clerk, House of Representatives, Washington, D. C.

"I, John Andrews, Clerk of the House of Representatives, do hereby certify that the attached is a true and correct copy of House Report 289 of the Eightieth Congress, First Session, as submitted to the House of Representatives, April 22, 1947, by Mr. Thomas of New Jersey from the Committee on Un-American Activities and noted in the Journal of the House of Representatives of April 22, 1947, Eightieth Congress, First Session.

"In witness whereof I hereunto affix my name and the seal of the House of Representatives, in the City of Washington, District of Columbia, the 23rd day of April, anno domini One thousand nine hundred and forty-seven.

"John Andrews, Clerk of the House of Representatives," and the seal is affixed, and this is the photostatic three-page document affixed to it and reads as follows:

"House of Representatives, Eightieth Congress, 188. First Session, Report No. 289.

"Proceedings against Eugene Dennis, also known as Francis Waldron. April 10, 1947.

"Mr. Thomas of New Jersey, from the Committee on Un-American Activities submitted the following report citing Eugene Dennis also known as Francis Waldron:

"The Committee on Un-American Activities as created and authorized by the House of Representatives through the enactment of Public Law No. 601, Section 121, subsection Q (2), caused to be issued a subpoena to Eugene Dennis, also known as Francis Waldron, who is general secretary of the Communist Party of the United States. The said subpoena directed Eugene Dennis, also known as Francis Waldron, to be and appear before the said Committee on Un-American Activities on April 9, 1947. and then and there to testify touching matters of inquiry committed to the said committee; the subpoena being set forth in words and figures as follows:

“ ‘By authority of the House of Representatives of the Congress of the United States of America, to Robert E. Stripling: You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, general secretary, Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which Honorable J. Parnell Thomas is Chairman, in their chambers in the City of Washington, on the 9th day of April, 1947 at the hour of 10 a. m., then and there
189 to testify touching matters of inquiry committed to said committee, and he is not to depart without leave of said committee. Herein fail not, and make return of this summons.

“ ‘Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, the 26th day of March, 1947. J. Parnell Thomas, Chairman.’

“ ‘Attest: John Andrews, Clerk.

“ ‘The said subpoena was duly served, as appears by the return made thereon by Robert E. Stripling, chief investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpoena and who served the said subpoena upon instructions received from the Chairman of the Committee on Un-American Activities. The return of the service by the said Robert E. Stripling being endorsed thereon, which is set forth in words and figures as follows:

“ ‘Subpoena for Eugene Dennis also known as Francis Waldron before the Committee on Un-American Activities, United States House of Representatives, served at 11:35 a. m., March 26, 1947, in the committee's chambers in Washington, D. C.

“ ‘Signed, Robert E. Stripling, chief investigator, Committee on Un-American Activities.’

“ ‘On April 7, 1947, a telegram was sent to Mr. Eugene Dennis, general secretary of the Communist Party of the

United States, which is set forth herein in words
190 and figures as follows:

"April 7, 1947. Mr. Eugene Dennis, General Secretary, Headquarters, Communist Party, 50 East 13th Street, New York, New York.

"This is to notify you that in response to the subpoena which was served upon you March 26, you are to appear before the Committee on Un-American Activities, at the committee's chambers, 225 Old House Office Building at 10 a. m., April 9, 1947, to then and there give testimony under oath concerning matters pertinent to the committee's inquiry.

"Robert E. Stripling, Chief Investigator, Committee on Un-American Activities.

"The said Eugene Dennis, also known as Francis Waldron, failed to appear before the said Committee on Un-American Activities on April 9, 1947, as directed by the subpoena served upon him on March 26, 1947, and the wilful and deliberate refusal of the witness to appear before the Committee on Un-American Activities is a violation of the subpoena served upon him by the Committee on Un-American Activities and places the said Eugene Dennis, also known as Francis Waldron, in contempt of the House of Representatives of the United States."

Mr. Fihelly (continuing): Call Mr. Thomas. There upon—

191

John Parnell Thomas

was called as a witness and, being first duly sworn, testified as follows:

Mr. McCabe: Your Honor, I move at this time that the other witnesses be excluded from the room during the testimony of this witness.

The Court: I have already ordered all witnesses to be excluded. If there are any in the room, they should leave.

Mr. Fihelly: None of ours are here.

Direct examination.

By Mr. Fihelly:

Q. Mr. Thomas, will you state your full name for the record, sir? A. John Parnell Thomas.

Q. You are a Congressman from the State of New Jersey, sir? A. That is correct.

— Q. And have been for how long? A. About ten and a half years.

Q. Are you also the Chairman of the present Committee of Un-American Activities of the House of Representatives? A. I am.

Q. When did you become Chairman of that committee in connection with the present committee—just roughly?

A. Some time in the early part of January of this year.

192 Q. Is that committee a standing committee of the House? A. Yes, sir.

Q. How does a standing committee differ from other committees? A. We have standing committees and special committees. An illustration of a special committee would be the old Dies Committee, which was created by resolution of the House, and those would expire at the end of that session of Congress. This standing committee is created by law. This particular committee is created by law and does not expire with the end of the session of Congress.

Q. It is just like the Committee on Rules and Finance, or any of the others? A. That is right.

Q. Will you state whether that committee is a bi-partisan committee? A. Yes, it is.

Mr. McCabe: That is objected to as irrelevant.

The Court: The objection is sustained.

By Mr. Fihelly:

Q. After you were appointed chairman, how soon did the committee function and hold meetings? A. Almost immediately.

Q. State whether or not there was a meeting held on March 26 of this year in the committee's chambers in the District of Columbia? A. There was.

Q. Who presided at that meeting? A. I did.

Q. Will you state whether or not there was a quorum present at that meeting? A. Yes, there was. A quorum was present.

Q. During the holding of the meeting—

The Witness (interposing): Your Honor, may I just make a slight correction on that?

The Court: Yes.

The Witness: On that day when the committee went into session at 10:30, there was a subcommittee sitting. We only had four members, and then as we went along within a half hour or so another member came in, and then we had five members, and a quorum was present.

By Mr. Fihelly:

Q. Did the defendant in this case testify before—did he appear before the committee on March 26 of this year? A. He did.

Q. At the time he appeared, will you tell us whether the committee which sat was a full committee? A. A full committee.

Q. Prior to March 26, did you have any communications with the defendant in this case, Mr. Dennis?
194 A. I did.

Q. Tell His Honor and the jury when the communications started and the general substance of the communication. A. We were considering—

The Court (interposing): If the communications are in writing, they would have to be produced.

Mr. Fihelly: There is no contest on that.

Mr. McCabe: Do you have a copy? There is objection to that.

Mr. Fihelly: I will ask the following documents be marked in evidence as Government's No. 8-A, B, C, and D for identification.

(Documents were marked Government Exhibits 8-A, B, C, and D for identification.)

The Court: You are now offering them as exhibits?

Mr. Fihelly: I intend to offer them, and we are showing them to counsel.

The Court: Did you tender them?

Mr. Fihelly: Yes, Your Honor.

Mr. McCabe: There is no objection to these, Your Honor.

The Court: They will be received.

(Government Exhibits 8-A, B, C, and D, for identification were received in evidence.)

The Court: You may read them to the jury.

Mr. Fihelly: I don't know but I think Your Honor would want to look at them (handing documents to the Court).

195 I will read to the jury number 8 in connection with the last question to Mr. Thomas. I will read the following Government exhibits to the jury, 8-A, a telegram, a Western Union telegram:

"March 1, 1947, 4:39 p. m.

"Rep. Parnell Thomas, House Office Building.

"According to the press the House Committee on Un-American Activities is scheduled to hold hearings commencing March 24, on Representative Rankin's bill H. R. 1884, and on Representative Sheppard's bill H. R. 2122. Since these bills directly concern the civil rights and status of communists and the Communist Party, U. S. A., and therefore the democratic rights of all other Americans, I request and insist that I shall be invited to offer testimony at these hearings in behalf of the National Committee of the Communist Party. Wire reply collect. Eugene Dennis, General Secretary, Communist Party, 35 East 12th Street."

Government Exhibit 8-B, is a copy of a Western Union telegram, dated March 19, 1947, and reads as follows:

"Mr. Eugene Dennis, 35 East 12th Street, New York City.

"Pursuant to your request of March 18, you have been scheduled to appear before the Committee on Un-American Activities on Wednesday, March 26, at 11:30 a. m.

"J. Parnell Thomas, Chairman, Committee on 196 Un-American Activities."

And Exhibit 8-C is a Western Union wire from New York, March 19th, 1947, and reads as follows:

"Hon. J. Parnell Thomas, House Office Building.

"I am in receipt of your telegram informing me that my request to appear before the Committee on Un-American Activities has been granted and that I am scheduled to testify on Wednesday, March 26, at 11:30 a. m. In order to adequately present the views and position of the Communist Party on H. R. 1884 and H. R. 2122 I shall need approximately two hours. Please inform me by return wire collect exactly how much time will be allotted me.

"Eugene Dennis, Executive Secretary, Communist Party of the United States."

And Exhibit 8-D is a copy of a telegram of Western Union, dated March 20, 1947, and reads:

"Eugene Dennis, Executive Secretary, Communist Party of the United States, 35 East 12th Street, New York, New York.

"Will be please to give you two hours.

"J. Parnell Thomas, Chairman, Committee on Un-American Activities."

By Mr. Fihelly:

Q. Do you know the defendant in this case? Can you point out Mr. Dennis? He did appear before the committee on the 26th? A. Yes, I can point him 197 out.

Q. Point him out for His Honor and the jury. A. He is the second man there. Mr. McCabe first and then Mr. Eugene Dennis.

Mr. Fihelly: Let the record show the defendant was designated by the witness.

The Court: Yes.

Mr. McCabe: That is agreed. 8

By Mr. Fihelly:

Q. Well, tell us in our own words what happened on the 26th. When the defendant did appear you stated there was a quorum, a full committee? What took place in the presence of the defendant in connection with this case? A. Mr. Dennis was sworn. Then I said to Mr. Stripling, the chief investigator of the Committee on Un-American Activities, to take the witness.

Mr. Stripling asked Mr. Dennis what his name was.

Mr. McCabe: I ask whether an official transcript of the proceedings was taken. If it was, I will suggest that would be a more accurate description of what went on than Mr. Thomas' recollection.

Mr. Fihelly: I think we are entitled to both.

The Court: The question before me is whether he may answer whether there was a stenographic transcript.

Mr. Fihelly: There is.

198 The Court: You may ask that.

Mr. Fihelly: There is one.

The Court: You object to his giving his recollection?

Mr. McCabe: Yes. I think the official record and the transcript of the official proceedings is the best record of what went on.

The Court: The objection is overruled.

The Witness: Your Honor, may I in order to refresh my recollection, read from the official hearing?

The Court: No, you may not.

By Mr. Fihelly:

Q. Just give your general recollection of what took place, and we can go into that later. A. My recollection is that when Mr. Stripling asked Mr. Dennis to give his name, Mr. Dennis replied: Eugene Dennis.

Then Mr. Stripling said: Is that your right name? And then there was a lot of wrangling over the question of names.

Then one of the witnesses asked Mr. Dennis how long——

Mr. McCabe: One of the witnesses?

The Witness: One of the members asked Mr. Dennis how long he had been using that name, and Mr. Dennis stated, replied to the effect that he had been using it for many years, a great, great many years.

Then I asked Mr. Dennis if Mr. Dennis had used that name on a passport, and Mr. Dennis did not reply to that.

199 Mr. McCabe: That is objected to as irrelevant and as tending to prejudice the jury because of other matters which are not germane to the indictment and which he is now on trial.

The Court: The objection is overruled.

Mr. McCabe: Your Honor grants an exception?

The Court: Yes.

By Mr. Fihelly:

Q. What else took place, if you recall anything further, Mr. Thomas? A. We got absolutely no response from Mr. Dennis, and Mr. Dennis would not say anything but Eugene Dennis, Eugene Dennis, Eugene Dennis, and we could not find out whether he had ever used any other name.

Mr. McCabe: I object to that part.

The Court: Read the answer.

(The last answer was read by the reporter.)

The Court: The objection is sustained.

Mr. McCabe: At this time, on the proceedings from now on, I would like to interpose an objection on the ground that under the act set forth in 28 U. S. C., 634, no testimony given at a committee hearing may be used against a witness in a criminal proceeding, except for purposes which are not germane to this inquiry.

The Court: Well, now, are you now making an objection to all of Mr. Thomas' testimony on that ground?
 200 Mr. McCabe: As long as he goes into testimony which Mr. Dennis gave at that hearing, I make that objection.

The Court: I do not think Mr. Dennis has given any testimony, according to Mr. Thomas, so far.

Mr. McCabe: He was just getting into that.

The Court: You object to that?

Mr. McCabe: I object to the comment, to that last part of it.

The Court: I sustained that. That will be stricken and ignored by the jury.

Your present objection might come up later. I do not think the case has reached that posture, but when it comes, I will entertain it.

By Mr. Fihelly:

Q. He did refuse to answer some questions that were asked? A. He did.

Q. What took place after that—not conclusions—just what actually was said or done in the presence of the defendant? A. Well, frankly, there was nothing said by Mr. Dennis, other than the fact that his name was Eugene Dennis, and he then also said that he held this committee in contempt.

Mr. McCabe: I object to that, Your Honor.

The Court: The objection is overruled.

201 Mr. McCabe: Exception.

The Court: Yes.

By Mr. Fihelly:

Q. Was a subpoena of any kind served upon Mr. Dennis?
 A. Yes, sir.

Q. Tell His Honor and the members of the jury about that. A. Well, the witness who had the stand before Mr. Dennis, a Mr. Schmidt—

Mr. McCabe (interposing): I object to that.

The Court: Yes. I can see no relevancy to what Mr. Schmidt did.

By Mr. Fihelly:

Q. Tell us about the subpoena. We didn't ask about Mr. Schmidt. A. A subpoena was served on Mr. Dennis to appear on April 9.

Q. Who ordered the subpoena served, if you know of your own personal knowledge? A. I did.

Q. To whom did you give instructions or orders? A. To whom? To Mr. Stripling, the chief investigator of the committee.

Q. Did you see the subpoena served on him? A. I did.

202 Q. What did Mr. Stripling say in your presence in connection with serving the subpoena? A. He said the record should show that the subpoena had been served.

Q. What, if anything, did you state? A. I said: The record will show that the subpoena has been served.

Q. I show you these two documents, which I will ask to be marked for identification with the next Government numbers, number 9 and 10.

Mr. Fihelly: Mark this one number 11, too, will you, please?

(Documents were marked Government Exhibits 9, 10, and 11 for identification.)

Mr. McCabe: I have an objection.

Mr. Fihelly: I want to ask him a question or two.

The Court: It has not been identified by the witness as yet.

By Mr. Fihelly:

Q. I show you Government Exhibits 9 and 10 for identification, Mr. Thomas, and ask you whether or not these are documents that you have testified about in connection with the service of a subpoena on the defendant on March

26 (handing documents to the witness)? A. These are.

203 Q. Now, the signature appearing at the bottom there, whose signature is that on the right at the bottom? A. My signature.

Mr. Fihelly: We offer these two in evidence. Counsel has seen them. I handed them to him. There is objection to them.

Mr. McCabe: As to Exhibit No. 9, which is an original, purports to be an original subpoena, objection is made because of the contention that the committee, that this committee was without constitutional authority to issue or serve such a subpoena.

As to Exhibit No. 10, which is a copy of the alleged subpoena, objection is made for the same reason, not having the right to issue a subpoena, and the committee had no right to serve a copy. And the second objection is that the copy on its face was not attested by the clerk as I believe is required by law.

By the Court:

Q. I understand, Mr. Thomas, that you signed Exhibit 9? A. That is correct, Your Honor.

Q. Did you see it served on anyone? A. Yes, I saw it served on Mr. Dennis.

By Mr. McCabe:

Q. The white or the pink one? A. The white one.

204 By the Court:

Q. On whom? A. Mr. Dennis.

Q. The defendant? A. Yes, Your Honor.

Q. Did you see the pink one, which is Government 10, brought to his attention? A. No, I could just see the white there. I could not see anything under the white.

The Court: Very well. The objection to number 9 is overruled. It will be received. Objection to number 10 is sustained.

Perhaps further testimony will make it admissible.

Mr. McCabe: I note an exception to number 9.

Mr. Fihelly: There will be further testimony on that, Your Honor.

(Government Exhibit 9 for identification was received in evidence.)

Mr. Fihelly: Now, I will read to the members of the jury Government Exhibit No. 9. Original.

"By authority of the House of Representatives of the Congress of the United States of America.

"To Robert E. Stripling. You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, general secretary, Communist Party of the United States to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is Chairman, in their chambers in the City of Washington, on the 9th day of April, 1947, at the hour of 10 a. m., then and there to testify touching matters of inquiry committed to said committee; and he is not to depart without leave of said committee.

"Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this 26th day of March, 1947.

"J. Parnell Thomas, Chairman.

"Attest: John Andrews, Clerk," and the seal of the House of Representatives is affixed.

There is a small form on the back which bears no writing.

By Mr. Fihelly:

Q. Was the hearing that you referred to before, Mr. Thomas, in your testimony on March 26? A. Yes, sir, it was.

Q. Do you recall who the member of the committee was that asked questions of Mr. Dennis in connection with his name, other than yourself? A. Mr. Peterson, of Florida.

Q. You stated to me you ordered Mr. Stripling to serve the subpoena. Did he have any power or authority
206 to serve the subpoena? A. Yes, sir, he did have power.

Q. I show you Government Exhibit 11 for identification, which I now desire to tender in evidence, and I show it to counsel.

Mr. McCabe: There is no objection to this as an authentic copy of a telegram sent to the defendant. There is objection to this telegram as proof that in response to the subpoena served upon him is proof he has to be before the committee. I object to this on the ground that the committee was without sanction or authority to demand Mr. Dennis' appearance. I admit that the telegram—

The Court (interposing): You do not object on the ground that it was not received by the defendant?

Mr. McCabe: No, sir.

The Court: Is the date set forth herein the same as the date contained on the subpoena?

Mr. Fihelly: Well, the subpoena was—

The Court (interposing): May I see the subpoena?

Mr. Fihelly: Yes, sir.

By the Court:

Q. Mr. Thomas, is 225 Old House Office Building the chambers of the committee— A. (Interposing) That is correct, Your Honor.

Q. On Un-American Activities? A. That is right,
207 Your Honor.

The Court: Your objection is overruled, Mr. McCabe. Government No. 11 will be received in evidence.

Mr. McCabe: Exception, Your Honor.

(Government Exhibit 11 for identification was received in evidence.)

By Mr. Fihelly:

Q. I show you Government No. 11, which has been admitted in evidence, and ask you whether you know that

telegram was sent to Mr. Dennis prior to April 9, the date on which he was to testify? A. Yes, I knew it was being sent to him.

Q. Was it sent at your instructions, Mr. Thomas? A. Yes, at my instructions.

Mr. Fihelly: Government Exhibit No. 11, members of the jury, is a copy of a Western Union wire, dated April 7, 1947, and reads as follows:

"Mr. Eugene Dennis, General Secretary, Headquarters, Communist Party, 50 East 13th Street, New York City.

This is to notify you that in response to the subpoena which was served upon you March 26, you are to appear before the Committee on Un-American Activities at the committee's chambers, 225 Old House Office Building, at 10 a. m., on April 9, 1947, to then and there give testimony under oath concerning matters pertinent to the committee's inquiry.

208 "Robert E. Stripling, Chief Investigator, Committee on Un-American Activities."

By Mr. Fihelly:

Q. On March 26 and April 9, 1947, what matters did the committee have under consideration? A. I cannot answer that as to April 9th.

Q. How about March 26? A. On March 26, we had under consideration the two bills referred to earlier here today.

Q. What did they generally relate to? A. About whether or not the Communist Party should be outlawed in the United States.

Q. Were you present at the committee on April 9th? A. No, I wasn't.

Q. And that is why you said you didn't know just what took place at that particular meeting? A. That is correct.

Q. After the meeting was held in committee on April 9th, did you have occasion to make a report to the House of Representatives with respect to the default of the

witness Eugene Dennis, the defendant in this case? A. Yes, sir, I did make a report.

Q. Now, do you have the hearing of March 26 before you? A. Yes, sir, I do.

Q. Will you open that to the page, the first page 209 of it, sir? A. Yes.

Q. What page is that? A. Page 236.

Mr. Fihelly: We ask this document be marked by the next identification number as a Government exhibit.

(Document was marked Government Exhibit No. 12 for identification.)

By Mr. Fihelly:

Q. And that takes in how many pages, Mr. Thomas, just in connection with the Dennis matter on the 26th of March? A. Five pages.

Mr. Fihelly: We offer these five pages in evidence, if Your Honor please.

Mr. McCabe: May I be indulged for a moment while I look at this, Your Honor? I haven't seen it.

The Court: Do you want to read through the five pages, Mr. McCabe?

Mr. McCabe: Yes. I don't know whether I will have time to read it in detail.

The Court: I want to give you that opportunity if you do.

Mr. McCabe: I would like to have that opportunity.

The Court: It is about lunch time. I thought you might do it during lunch time.

210 Mr. McCabe: That is a good idea.

The Court: The Court is meeting in General Term today, and I am hopeful that we can conclude our business by 2 o'clock, but I will have to recess until 2 o'clock. So you will not be required to be back until then.

Members of the jury, be back at 2 o'clock, and I hope I can be back at 2 o'clock.

Mr. McCabe: I assume the witness will be under instructions not to discuss the case with witnesses or with any others?

The Court: Yes.

You are not to discuss the testimony you have given or any testimony you will give with any other witness or any other person, Mr. Thomas.

The Witness: Yes, sir.

The Court: We will recess until 2 o'clock.

(Thereupon, at 12:30 o'clock p. m., a recess was taken until 2 o'clock p. m.)

211

AFTERNOON SESSION

(The proceedings were resumed at 2 p. m., at the expiration of the recess.)

The Court: Will counsel come to the bench, please?

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Mr. Weinrich, the deputy marshal, has just informed me that another deputy marshal informed him that this woman newspaper writer told the deputy marshal second mentioned that Juror 6 or 12 came up to her as he left the courtroom for lunch and made some statement. She did not hear what it was. I thought I would tell you gentlemen that. So if you want to make any inquiries, you may do so.

Mr. McCabe: 6 or 12? They did not specify?

The Court: I just told you the way it came to me.

Mr. McCabe: The Negro or white man?

The Court: I have no information other than the way I gave it to you.

Mr. McCabe: Which one of the reporters was it?

The Court: Woman reporter, he said. There are two now. I do not know which one of those it is.

Mr. McCabe: One has been in constant attendance, and the other has not, as I recall it.

The Court: I suggest, if it meets with your approval, that after we adjourn for the day, you two together
212 talk to the two reporters and see what there is to it.

Mr. McCabe: Or we can talk a few minutes now.

The Court: I just wonder if the jury may question what it is about. Don't you think that would be better?

Mr. McCabe: I think it would. Then we would not be in a hurry.

The Court: Then you can report back to me after you identify which one it is and after you talk to them. Is that all right with both sides?

Mr. Fihelly: Yes.

Mr. McCabe: Yes, sir.

(Counsel resumed their places at the trial table, and the following occurred:)

The Court: The witness will resume the stand.

Mr. Fihelly: Your Honor, there were certain exhibits in the hands of the jury at the time we adjourned court. May those be given back?

The Court: Yes.

Thereupon,

J. Parnell Thomas

resumed the witness stand, and the following occurred:

Mr. Fihelly: We offered the official report, the five pages of the testimony of March 26.

Mr. McCabe: Government Exhibit No. 12. I have examined that, your Honor, and I do object to it on the ground that it is irrelevant and, secondly, that there
213 are numerous gratuitous statements in here which are not germane to this hearing, which, in my opinion, would of necessity prejudice the jury. I shall be glad to call those passages to the Court's attention.

The Court: Suppose I look at it.

Now, as I understand it, Mr. McCabe, you do not question the accuracy or authenticity of the report?

Mr. McCabe: No, sir.

The Court: You do not object on that ground?

Mr. McCabe: No, sir.

I object further on the ground relative to 2 U. S. Code 634. There again it is an attempt to use testimony elicited from a witness at a committee hearing at a criminal prosecution. Other than that we do not have anything else.

The Court: Now, Mr. Fihelly, are you offering any part of this other than the colloquy between the defendant and either a member of the committee or its investigator?

Mr. Fihelly: Just the questions that were asked as generally outlined by the witness this morning, questions asked by Mr. Stripling, Mr. Thomas as chairman, and Mr. Peterson, and the replies by the witness, showing that a subpoena was served.

The Court: Mr. McCabe said there were certain statements made which were not germane to this case, and I understood him to say by some one other than
214 the interrogator.

Mr. McCabe: I will be glad to point them out to your Honor.

The Court: Yes. Come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: The first instance occurs on page 238, where Mr. Stripling makes the statement to the chairman (indicating).

The Court: You do not offer that, do you, Mr. Fihelly?

Mr. Fihelly: I do not know what statement that is. What statement is that?

Mr. McCabe: This statement (indicating).

Mr. Fihelly: I have no objection to that going out. I will just put a pencil mark alongside of it.

The Court: Very well.

Mr. McCabe: I call attention to page 239, a statement by Mr. Stripling which would indicate the commission of another offense.

The Court: You do not offer that, do you?

Mr. Fihelly: Let me see which part that is, Mr. McCabe. We can probably make the same arrangement.

No; I think that can be covered by another question, that they had information that he had used other names, which would not show any other offense.

The Court: I would not permit that portion of it.

215 Mr. Fihelly: I am striking that out.

Mr. McCabe: It seems to me, though, we are taking a chance on getting something in there when it has been pretty well covered by the witness. In that case I should of necessity withdraw my objection to his testimony on the ground that it is not the best evidence, because that would prejudice the defendant if we cut this out. At the conclusion, also, Mr. Stripling said he served a subpoena upon him. Of course, that is not evidence in this court. Mr. Stripling served him with a subpoena.

The Court: No; that will have to go out.

Mr. McCabe: Those are just points. If any of it is going in, I would like the privilege of going over it with a fine-tooth comb.

The Court: You have had an hour to read five pages.

Mr. McCabe: I will be glad to do it. I am pointing out things that I thought vitiated this as testimony in this case.

The Court: The charge is wilfully failing to respond to a subpoena.

Mr. Fihelly: After having been properly served.

The Court: This was preliminary to that.

Mr. Fihelly: That is right, on the service.

The Court: I do not believe that the interests of the Government necessitate a question and answer of what took place prior to the service of the subpoena.

216 Mr. McCabe: If I choose to refute it, that is my job.

The Court: Especially when, as I understand it, you are withdrawing your objection to the testimony of Mr. Thomas as to what took place there?

Mr. McCabe: Yes, I should certainly have to do that.

The Court: After all, this is just corroboration of what Mr. Thomas said.

Mr. Fihelly: What item would you indicate as starting in connection with the service?

The Court: The service will be established by Mr. Strippling and by Mr. Thomas.

Mr. Fihelly: In other words, there is nothing in there in connection with the service—

The Court: Yes; at the very end.

Mr. McCabe: That is simply a statement by Mr. Strippling.

The Court: And a statement by the chairman that the record will so show.

Mr. Fihelly: If you feel that way about it, I will be glad to leave it as it is.

The Court: I think it is unnecessary and there might be something in there that would be prejudicial.

Mr. Fihelly: I can see that, but the real reason that I brought it up, frankly, was in view of the question as to whether there was a stenographic report, and I felt it was my duty to offer it. I won't press it any further.

217 Mr. McCabe: I now withdraw, of record, my objection to the testimony of Mr. Thomas which was based on the ground that it was not the best evidence and that the best evidence would be the typewritten record, in view of our discussion here and your Honor's ruling. I withdraw my objection.

Mr. Fihelly: We will leave it that way, your Honor. That is all right.

(Counsel resumed their places at the trial table, and the following occurred:)

Direct examination (Resumed).

By Mr. Fihelly:

Q. I have only two further questions. One may have been asked, but, out of caution, I will repeat it. You mentioned that on March 26 the defendant Dennis was asked the question with respect to his name. You stated there was a quorum present. I do not recall whether I asked you as to whether the witness was sworn first. A. The witness was sworn, and I so stated.

Q. Sworn by whom? A. Sworn by me.

Q. On that particular date and prior to the appearance of the defendant Dennis and his being sworn, will you state whether or not your committee had certain information with respect to the defendant having at different times, as a member of the Communist Party, used different names?

218 Mr. McCabe: That is objected to, your Honor, as irrelevant.

The Court: Sustained.

Mr. Fihelly: Is that sustained?

The Court: Sustained.

Mr. Fihelly: That is all I have, your Honor.

The Court: I think that would involve hearsay, Mr. Fihelly, unless you wish to argue that point.

Mr. Fihelly: All that I had, your Honor, in mind was that I wanted to show there was some reason for the questions that were propounded. It just was not a fishing expedition.

The Court: When you asked him whether he had information, that involves of itself hearsay.

Mr. Fihelly: Of course, I had in mind, your Honor, showing, as Mr. Stripling would be the next witness, that they had official investigators with the committee to delve into this particular matter.

Mr. McCabe: I object to this statement in front of the jury.

The Court: I do not think that is relevant.

Mr. Fihelly: Very well, your Honor.

Cross-examination.

By Mr. McCabe:

Q. Your name is John Parnell Thomas? A. That is correct.

219 Q. How long has that been your name? A. Since July 1919.

Q. What was the name of your parents and the name you had at birth? A. My mother's name was Georgiana Thomas and my father's John Parnell Feeney.

Q. Mr. Thomas, you have been a member of the Committee on Un-American Activities and its predecessor committees since their inception in 1938; is that correct? A. That is correct.

Q. You were a member, of course, then, when it was known as the Dies Committee? A. That is correct.

Q. Your committee built up, did it not, a list of names of persons that you considered as having been members of or as having sponsored un-American organizations and their fronts?

Mr. Fihelly: Just a moment. I object to the question, your Honor. We have nothing to do here with the Dies Committee, not a thing. We have something to do with this defendant's not appearing before the present committee.

The Court: Read the question back, Mr. Reporter, please.

(The last question was read by the reporter.)

The Court: Overruled.

The Witness: I would like to hear the question again, please.

220 (The last question was again read by the reporter.)

The Witness: Do you mean the present standing committee?

By Mr. McCabe:

Q. No; I mean the predecessor committees. A. You mean the Dies Committee?

Q. Yes.

The Court: Well, if you mean the Dies Committee, I sustain the objection.

Mr. Fihelly: That was my objection, your Honor.

The Court: The question was "your committee."

Mr. McCabe: If your Honor please, what I mean is that this list which I have referred to as a black list was initiated under the old Dies Committee, was kept up to date, and I believe I can show that one of the reasons urged in support of the continuance of the committee—

Mr. Fihelly: I think statements of this kind should be made at the bench.

By the Court:

Q. Let me ask you, Mr. Thomas, when did this committee of yours become a permanent committee? A. On or about January 3 of this year.

Q. Of this year? A. That is right.

The Court: Until you show that there was a connection between the temporary or select committee—Is that correct?

221 The Witness: That is correct; a special committee.

The Court: —I will sustain the objection.

Mr. McCabe: Your Honor will grant me an exception?

The Court: Yes.

By Mr. McCabe:

Q. Mr. Thomas, is there any change in the purposes of the present or standing committee, if that is the correct term, as set forth in the House resolution setting up that committee, and the purposes of its predecessor committees as set up by successive House resolutions since 1938? A. Well, I can clearly testify as to the purposes of the present committee.

Q. You could? Couldn't you testify as to the purposes of the predecessor committees? A. I can, yes, but in order to find the exact wording, I would have to review the laws. I would have to review the resolutions on the subject.

Q. Do you know of any alterations even in the phraseology of the resolution insofar as it sets forth the purposes for which this committee and the predecessor committees were set up? A. Well, I think the answer to that question is exactly the same as to the question you asked me just before. I can not recall the phraseology of the language of the predecessor committee.

222 Now, perhaps I have it here and perhaps it will refresh your recollection.

Is it a fact, Mr. Thomas, that the first enactment authorized investigations by the committee first of un-American propaganda activities?

A. Are you now referring to the old Dies Committee?

Q. I am referring to the Dies Committee first. A. That is correct.

Q. Is that also contained in the resolution setting up this committee? A. No resolution was passed setting up this committee. This committee was set up by an act of Congress, a law, known as the Legislative Reorganization law, No. 601, and in law 601, section 121 Q (2) outlines the purposes of this standing committee, and, your Honor, I have a copy of the law right here.

Q. Yes. Suppose you read, Mr. Thomas, the purposes of the committee as set forth there. A. "Committee on Un-American Activities. Un-American Activities.

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda as instigated from
223 foreign countries or of a domestic origin and attacks the principle of the form of government as guar-

anted by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

Mr. McCabe: I believe that has already been offered in evidence.

Mr. Fihelly: That is Government 1.

By Mr. McCabe:

Q. Now, Mr. Thomas, are you aware of the fact that House Resolution 282 of the Seventy-Fifth Congress in its third session, as reported in 83 Congressional Record at page 7568 to 7586—that was in 1938—contains precisely the same phraseology? A. Well, I could not say that I am aware until I see the phraseology in that other resolution.

Q. Do you know of any difference in the phraseology? A. Is that the Seventy-Fifth Congress?

Q. That was the Seventy-Fifth Congress, yes, and similarly for the resolutions of the Seventy-Sixth Congress, the Seventy-Seventh Congress, the Seventy-Eighth Con-

gress, and the Seventy-Ninth Congress? A. Well, I would certainly have to refresh my mind on something that happened 10 years ago.

Q. I see, but would you say that it would be possible that the purposes of the present committee as set forth in the resolution you have just read are different from those of the predecessor committees? A. I would say this, in answer to your question, that we operate the present committee in quite a different manner than the other committees were operated, and probably due, if I may explain, your Honor, —

Mr. McCabe: Just a moment. Your Honor, I do not think that is responsive to my question. I am asking him concerning the purposes as set forth in various resolutions, and now Mr. Thomas is going into a talk on
225 the different manner in which their businesses are conducted, which I do not think is responsive to the question and is not relevant at this time.

The Court: Of course, the resolutions speak for themselves, and I think you have proceeded far enough. If you wish to get the resolutions in, they may be received in evidence.

By Mr. McCabe:

Q. Now, Mr. Thomas, does the present committee have in its possession or in its custody the files of the predecessor committees? A. We hope we have all the files.

Q. Insofar as has been possible for the committee to gather and protect the files, am I right in saying that you do have the files? A. I would say it is reasonably certain that we have a very large percentage of the files.

Q. Allowing for simple loss of papers and things like that that may happen. Now, among the papers which you have, do you have a list of persons coming within the category concerning which I asked you before, a list of persons that you consider as having been members of or as having sponsored un-American organizations and their fronts?

Mr. Fihelly: I object to the question. I think there is a single issue in this case: Was the defendant properly served? Did he wilfully make default?
 226 It has got nothing to do with what the files of the old Dies Committee or the files of the present committee may consist of. That is entirely collateral, I respectfully submit.

The Court: This is cross-examination. I will allow reasonable latitude. You may answer.

The Witness: Yes. May I have the question again, please?

(The last question was read by the reporter.)

The Witness: I hope we have.

By Mr. McCabe:

Q. How long is it since you have had recourse to that list or any portion of it? A. It would not be in the form of a list. Their names, if they existed, would be in file cabinets, and we have a very large number of file cabinets. The cabinets probably are in rooms as large as this one, we will say.

Q. Do you recall stating on March 11, 1942, as follows: "Hundreds of thousands of names of individuals who at one time or another have been members of or have sponsored un-American organizations and their fronts are card indexed in our files"? A. I do not remember saying it, but I would say it now.

Q. Now, those files were made available, were they not, to various Government agencies? A. That is
 227 correct.

Q. Were they made available to members of private industry? A. I do not know of any cases.

Q. Would you say that they were not made available to members— A. Are you now referring to this committee, the present committee?

Q. I am referring, first of all, to this committee. Let us confine it to this committee. A. Yes, because I can't

tell about the other committee, but in this committee we have a rule now that we permit agents of the Government to come and see our files and we permit Members of Congress access to our files. We do not permit outside individuals to come in.

Q. Was any legislation proposed as a result of the files which you had? A. No, not that I know of.

Mr. Fihelly: If your Honor please, I ask that the last question and answer be stricken as irrelevant and immaterial.

The Court: Sustained.

Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. As a matter of fact, didn't your committee chairman, during the time it was the Dies Committee, state over and over again—I withdraw that. A. I
228 couldn't say—

The Court: Wait a minute. Let him finish his question.

By Mr. McCabe:

Q. Did he state that the principal activity of the committee was the formulation of such a list so that the spotlight of publicity could be brought on such persons, even though their activities were not illegal?

Mr. Fihelly: Just a moment. I object to the question as irrelevant and immaterial.

The Court: Sustained.

Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. Now, how many names are on that list today? A. There is no list.

Q. How many names are in the files? In our files? Well, there are a hundred thousand communists in the United States. They say themselves they have 74,000 dues-paying members—

Mr. McCabe: I object to Mr. Thomas' tabulating out loud. If he wishes to use any form of tabulation, I am perfectly willing to wait while he counts it up, but I do not think he should think out loud.

The Court: Mr. Thomas, make your answers responsive. If you have to have a little while to make your additions, take whatever time is necessary.

229 The Witness: I should think there would be at least 100,000 names. I hope so.

By Mr. McCabe:

Q. Well, now, let me ask you this. As reported in the Congressional Record, at page 797—that is the Congressional Record of the Seventy-Eighth Congress, first volume—did you say this:

“The seven rooms which now hold our committee's files here in Washington are crammed with the records of subversive activities which involve something like a million individuals or more than a thousand organizations. The files of our committee's New York and Los Angeles regional offices are proportionately large. All this vast quantity of evidence is in reality in the possession of the House of Representatives, which was voted the funds for assembling it”?

Mr. Fihelly: If your Honor please, in the interest of time, I again object.

The Court: Sustained.

Mr. Fihelly: The Seventy-Eighth Congress has nothing to do with the Eightieth Congress.

The Court: Sustained.

Mr. McCabe: Will your Honor give me an exception?

By Mr. McCabe:

Q. Will you say, Mr. Thomas, that the number of names in your files has decreased since the time when the Seventy-Eighth Congress was sitting? A. No, I
230 would say that it has not decreased.

Q. Except, of course, for deaths and removals, and things of that sort.

Am I wrong in saying that it is probably increasing all the time? A. I would say it is increasing all the time.

Q. Now, let me ask you this, Mr. Thomas. Were all of those persons given an opportunity to come before your committee and defend themselves against the charge of being persons who were subversive or had sponsored un-American organizations or fronts?

Mr. Fihelly: Which committee are you talking about, Mr. McCabe?

Mr. McCabe: I am speaking of the predecessor committee now.

Mr. Fihelly: We object, if your Honor please.

The Court: Sustained.

By Mr. McCabe:

Q. Now, I will ask you whether, since you have been chairman of this standing committee, you have invited persons whose names are on that list. A. There is no list.

Q. Whose names are in the files. Pardon me. I am probably thickheaded enough that I will say "list" a few other times. You correct me each time. I do
231 not do it intentionally.

Whose names are in your files. Have you asked any of them or invited any of them to come before your committee and show cause to you why their names should be removed from these cards?

Mr. Fihelly: Just a moment. I object to it as irrelevant and immaterial. It has nothing to do with the issues in this case, your Honor.

The Court: Sustained.

Mr. McCabe: Your Honor will grant me an exception?

By Mr. McCabe:

Q. Within the last two weeks did your committee, the present committee, publicize as honeycombed with Communists or as a Communist front the Southern Conference for Human Welfare?

Mr. Fihelly: If your Honor please, again that is irrelevant and immaterial. It has nothing to do with the issue in this case.

The Court: Sustained.

Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. Did you have before you for examination or testimony any members of the Southern Conference for Human Welfare?

Mr. Fihelly: Same objection, your Honor.

The Court: Sustained.

232 Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. When your present committee proposes to place in your card index the name of any person or organization, is that person or organization notified of the proposed inclusion of his or its name on its list?

Mr. Fihelly: I make the same objection, your Honor.

The Court: Same ruling.

Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. Did your predecessor committee turn over to the Federal Bureau of Investigation for investigation a list of persons from your files with the recommendation that they be investigated?

Mr. Fihelly: If your Honor please, again in the interest of time, I again object to what was done by a predecessor committee. It has nothing to do with the issue here.

The Court: The objection is sustained.

Mr. McCabe: Your Honor grants me an exception?

By Mr. McCabe:

Q. Do you have before you, in the consideration of whether or not a person or organization comes within

your definition of subversive or un-American, any judicial declaration, of what constitutes un-American or subversive activity?

233 Mr. Fihelly: I object to the question as irrelevant and immaterial, your Honor.

The Court: Overruled.

A. Do we have any judicial test?

By Mr. McCabe:

Q. Yes. A. I would say we have—every member of the committee has—a very good idea of what is un-American. Certainly, any person or organization that would destroy the Government of this country, destroy the American institutions, would be in the purview of this committee.

Q. That would include an organization which would destroy the institution of free speech? A. There is no doubt about that.

Q. Would it include an organization which would destroy the privilege granted in the Bill of Rights or established in the Bill of Rights that a person to be accused of a crime would be granted the right to have counsel of his own choice? A. Now, you want to remember, Mr. McCabe, that I am no attorney.

Q. You just answer the question. A: I am just a plain, ordinary, little businessman.

Q. If you want any advice, ask counsel for the Government or the court. A. If you will have the question repeated, I will try to answer it.

234 The Reporter: (Reading) "Would it include an organization which would destroy the privilege granted in the Bill of Rights or established in the Bill of Rights that a person to be accused of a crime would be granted the right to have counsel of his own choice?" A. I would say that it would include a person or group that would destroy any part of the Bill of Rights.

By Mr. McCabe:

Q. When you were recommending legislation to deprive Robert Morse Lovett of his right to be an officer of the United States Government—

Mr. Fihelly: Just a moment. Your Honor, I think all these questions should be at the bench. This is something that came up before the Dies Committee. Counsel knows it is improper, and he should not even ask the questions unless first submitting them to the Court.

The Court: I sustain the objection.

Mr. McCabe: Your Honor will grant me an exception?

By Mr. McCabe:

Q. You say that every member of the committee has a good idea of what constitutes subversive? A. I can only speak for myself, but I would assume that every member of our committee now has a very good idea of what
235 constitutes un-American activities; but I can only speak for myself.

Q. Of course, you could not speak for your fellow committeeman, Mr. Rankin? A. Nor could I speak for Mr. Wood, or Mr. Mundt, or Mr. Peterson, or any of the others.

Q. Well, now, let me see if I can draw from you something further as to your conception of what is un-American. For instance, may I put this statement to you and ask you whether you consider that subversive or, within your statement, a person destroying American institutions—

Mr. Fihelly: If your Honor please—

The Court: That had better be made at the bench. You have gone rather far.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: What is your question?

Mr. McCabe: At the point where the objection was made, I propose to read to the witness the following statement:

"This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it."

I propose to ask him whether in his estimation that would brand the speaker as a subversive. Then I
236 propose to call to his attention that it is from the First Inaugural Address, March 4, 1861, made by Abraham Lincoln.

The Court: I sustain the objection. I had heard that quotation, but I did not identify it as given by Lincoln.

Mr. McCabe: I thought even Mr. Thomas might have heard it.

I propose then to ask him several other questions, along those lines. I was going to ask him if he thought that this would brand the speaker as subversive:

"If there be any among us who wish to dissolve this Union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

Then I propose to ask him whether he considered that the speaker was subversive and call his attention to the fact that that was the Inaugural Address delivered March 4, 1801, by Thomas Jefferson.

I proposed then to ask him whether he considered this un-American:

"There is tonic in the things that men do not love to hear; and there is damnation in the things that wicked men love to hear. Free speech is to a great people what winds are to oceans and malarial regions, which waft away the elements of disease, and bring new elements of
237 health; and where free speech is stopped miasma is bred, and death comes fast."

I propose to ask him if he recognizes that as a quotation from Henry Ward Beecher. It is a little more flowery than the others.

The Court: You object to this?

Mr. Fihelly: Yes, sir, on the same ground.

The Court: The objection will be sustained and an exception allowed.

Mr. McCabe: I intend to ask him about this quotation from Wendell Phillips:

"No matter whose the lips that would speak, they must be free and ungagged. The community which does not protect its humblest and most hated member in the free utterance of his opinions, no matter how false or hateful, is only a gang of slaves. If there is anything in the universe that can't stand discussion, let it crack."

This may be a little long-winded, but this quotation reads:

"The constitutional right of free speech has been declared to be the same in peace and in war. In peace, too, men may differ widely as to what loyalty to our country demands; and an intolerant majority, swayed by passion or by fear, may be prone in the future, as it has often been in the past, to stamp as disloyal opinions with
238 which it disagrees. Convictions such as these, besides abridging freedom of speech, threatens freedom of thought and of belief."

That is a quotation from Louis D. Brandeis in *Schaefer v. United States*, 251 U. S. 466, at 495.

In addition, I propose to ask Mr. Thomas at that stage whether or not his committee was not engaged in the deliberate effort to crush the right of free speech.

The Court: Do you object?

Mr. Fihelly: Certainly, your Honor.

The Court: Sustained.

Mr. McCabe: Exception. I think we are agreed that Mr. Fihelly does not have to make an objection for the record. I won't take his silence as assent.

This was a quotation from Charles E. Hughes in his report to the American Bar Association in 1925, pages 186 to 187, in which he said:

"Our institutions were not devised to bring about uniformity of opinion; if they had been, we might well abandon hope. It is important to remember, as has been said, that the essential characteristic of true liberty is, that under its shelter many different types of life and character and opinion and belief can develop unmolested and unobstructed."

Then I want to ask him whether he considered this quotation as subversive or as indicating an un-American
239 attitude on the part of the speaker:

"If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

That is a quotation from Oliver Wendell Holmes in *Gitlow v. New York*, 268 U. S. 652, at 673, in 1925.

I propose to ask him whether he considered that a speaker advocating freedom of speech for those advocating the propagation of the beliefs of the proletarian dictatorship was subversive.

I am trying to skip one or two, in the interest of brevity, your Honor.

I propose to ask him whether this was a subversive statement:

"The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance."

The Court: Do you think you need any more to preserve your point?

Mr. McCabe: That was from the opinion of Hugo L. Black in *Martin v. Struthers*, 319 U. S. 141, at page 143, in 1943.

If your Honor will indulge me a moment—

240 The Court: Yes.

Mr. McCabe: Here is one I would like to get in. It is from Robert H. Jackson, in *Board of Education v. Barnette*, 319 U. S. 624, pages 641 and 642, in 1943:

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard . . . But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

I propose to attempt to draw from this witness by means of inquiry as to what his reaction to those quotations would be, the attitude which I believe would be expressed; that his definition of what is un-American and subversive—and that would be, therefore, the definition which controls this committee—is at variance with the thought not only of the founding fathers, of Jefferson, of the preserver, Lincoln, and of the present Justices of the Supreme Court; and I propose to do that in furtherance of my argument
241 that this committee is not a constitutional committee; that its purpose is to throttle free speech, to control thought; and that it has no legislative purpose.

Mr. Fihelly: We object to each and all of the proffered quotations.

The Court: Objection sustained. An exception is allowed.

Mr. McCabe: Your Honor will allow me an exception?

The Court: Yes.

Mr. McCabe: I would like to put of record, in furtherance of what your Honor said, that I had a great deal many more quotations along those lines. These are typical of the quotations and the others would be merely cumulative. I think they would add nothing new to the situation.

(Counsel resumed their places at the trial table, and the following occurred:)

The Court: Resume the stand, Mr. Thomas.

Mr. McCabe: Mr. Reporter, could you go back? It seems to me that there was a question which was unanswered. Perhaps I will rephrase it. It will save time.

By Mr. McCabe:

Q. I believe, Mr. Thomas, I asked you, perhaps in other words, whether your present committee, in its deliberations as to whether or not an individual or an organization should be branded as subversive or un-American, had before it a judicial pronouncement as to what is
242 un-American or what is subversive. A. No, we do not have an official pronouncement before us.

Q. That answers my question.

Now, Mr. Thomas, is it a fact that in probably late March of this year, prior to your holding the meetings which have been discussed here today, you had announced that you would not hear the testimony of any Communist?

A. I have heard that there was something in the paper along that line, but I do not recall any official announcement by the committee.

Q. Now, when you received a telegram from Mr. Dennis asking leave to testify, did you act upon that telegram at an executive meeting? A. Yes. We had an executive ses-

sion to determine what persons would be called as witnesses in this series of hearings. Mr. Dennis was one of the names accepted by our committee. There were many others.

Q. Did you have any consultation with any person outside of the committee with regard to the invitation to be extended to Mr. Dennis? A. I do not recall of any conversation.

Q. As a matter of fact, Mr. Thomas, didn't you invite Mr. Dennis there simply for the purpose of harassing him and embarrassing him? A. Not at all. We invited 243-244 him there because he asked to be invited. No. 1.

No. 2: He is the general secretary of the Communist Party, and as we were studying the question of Communism, we certainly would like to have the general secretary of the Communist Party come before us as a witness.

Q. Why didn't you invite him of your own accord? A. There were many we did not invite of our own accord until we heard from them.

Q. Yes, but you volunteered the statement that as he was the general secretary of the Communist Party, of course you wanted to have his information with regard to this legislation you were considering. A. That is correct, and many of the others who were invited were not invited until we had this meeting.

Q. Well, then, you did not get from him any expression of opinion regarding the legislation before you, did you? A. There is no question about that. We could not even get started with Mr. Dennis, and I might add that—

The Court: No. You have answered.

By Mr. McCabe:

Q. Do not just add anything.

He gave his name to you as Eugene Dennis, didn't he? A. That is correct.

Q. When Robert Taylor appeared before you recently, did you ask him what was his right name? A. No.

245 I did not ask—I don't think I asked Mr. Dennis if that was his right name. When Robert Taylor was before us, however, I did not ask him whether that was his right name.

Q. He is known as Robert Taylor, and you are willing to accept his testimony under the name of Robert Taylor; is that correct? A. That is correct.

Q. Would the same thing go for other witnesses who are well known in the sporting or literary or theatrical world?

A. Yes, but Mr. Dennis was general secretary of the Communist Party, and as general secretary of the Communist Party Mr. Dennis follows a certain line—

Mr. McCabe: I object to Mr. Thomas' statement now as not responsive to any question.

The Court: Sustained.

By Mr. McCabe:

Q. If you sincerely wished from Mr. Dennis the information he had with regard to the legislation considered before you, will you tell me what difference it would make whether it came from a man named Eugene Dennis or a man named Louis F. McCabe or any other name? A. Because we would like to identify Mr. Dennis and we had heard from various sources that Mr. Dennis—

Mr. McCabe: I object.

Mr. Fihelly: Let him answer the question.

246 Mr. McCabe: No.

The Court: I think that is beyond the scope of the question.

By Mr. McCabe:

Q. I asked you what difference it would make whether the man testifying before you as the general secretary of the Communist Party gave the name Eugene Dennis, by which he testified he had been known for a great deal longer time than you have been known by the name of John Parnell Thomas— A. Because we were—

Q. What difference would it make——

Mr. Fihelly: I object.

The Court: He has a right to answer the question.

Mr. Fihelly: Let him answer or I object. It is argumentative.

The Court: What difference would it make?

Mr. Fihelly: Let him answer.

The Witness: We were not only having hearings in connection with these two bills. We were continuing a study of the activities of the Communist Party, and when the general secretary of the Communist Party came before us, naturally we would want to identify fully the general secretary of the Communist Party, and that is why we were trying to find out if there were not four or five other names, maybe, that Mr. Dennis was going under over a period of time; if he had not taken out a
247 passport under a name other than Eugene Dennis——

Mr. McCabe: I object to that.

The Court: You asked him what name he was going under.

Mr. McCabe: He is going far afield. Certainly that would have nothing to do with the quality of the testimony before the committee.

The Court: I do not think anything he has said so far has gone beyond the inquiry you made.

By Mr. McCabe:

Q. But you say you did not ask Mr. Taylor what his name was. A. No, because we knew Mr. Taylor was not a member of the Communist Party.

Q. Didn't Mr. Taylor tell you that he was almost forced to do the bidding of the Communist Party? A. I never saw any such testimony.

Q. Didn't he testify that he was coerced into taking part in a motion picture which you considered subversive? A. That is correct—no; no; not that we considered subversive.

Q. That he considered subversive? He did testify to that? A. Yes; he submitted testimony along that line.

Q. Now, you said that you wished to examine Mr. Dennis concerning other matters than the matter
248 of legislation which was under consideration. Mr.

Dennis had asked for time to discuss this proposed legislation, had he not A. That is correct.

Q. And you proposed having him there in pursuance of your invitation to testify concerning certain legislation? You proposed to go into matters which did not concern that legislation; is that correct? A. Not necessarily. It concerned it very vitally. The question of communism concerns this legislation, and the activities of the Communist Party and the activities of the leader of the Communist Party is very vital in the consideration of this legislation.

249 Q. As a matter of fact, Mr. Thomas, hadn't you been advised by the Attorney General that the legislation which you had under consideration was undoubtedly unconstitutional? A. The Attorney General was not a witness.

Q. I did not ask you whether he was a witness, Mr. Thomas. I asked you whether you had received advice from the Attorney General that the legislation which you had under consideration for recommendation to Congress was undoubtedly unconstitutional? A. Prior to these hearings we received that advice? Is that what you mean?

Q. I am asking you that. A. I don't recall getting anything from the Attorney General on that question.

Q. When was this subpoena made up, Mr. Thomas? A. Probably a few days before Mr. Dennis appeared; maybe five days; seven days; maybe ten days before; and, Your Honor, may I explain—

The Court: No. You answer the questions. Mr. Fihelly will take the matter up on redirect.

By Mr. McCabe:

Q. It was signed by you when? A. Maybe five to ten days prior to that date.

Q. No question that it was signed by you prior to the 26th of March? A. There is no doubt about that.
250 It was signed by me prior to that date.

Q. Now, I show you Government's Exhibit No. 9 and call your attention to the attestation by you in which you say, over your signature:

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this 26th day of March, 1947, J. Parnell Thomas"
(handing a document to the witness).

Is that correct? A. That is my signature.

Q. You say, when you, over your signature, that your hand and seal was to be a witness the 26th day of March 1947. That is incorrect? A. No; it could be a witness on that day, too, but I say this: that I signed those subpoenas prior to that date.

Q. Did you sign them in blank? A. Yes.

Q. You sign subpoenas in blank? A. Yes.

Q. You mean you, as chairman of this committee, affix your name as chairman, over your hand and seal, to subpoenas which are blank as to the person to be summoned? A. We always keep a very small reserve supply of subpoenas signed by me on hand, so if I should be out of town, or something like that, the chief in-
251 vestigator could contact me, and then he would have that signed subpoena.

Q. At the time that you executed this was it addressed to Robert E. Stripling or to Louis J. Russell? A. I addressed Robert E. Stripling while we were in the meeting and told him to have a subpoena drawn up for Eugene Dennis.

Q. While you were at the meeting? No question about that? A. Yes, but I want to add this: The meeting I am referring to is when this man Schmidt was on the stand.

Q. I am speaking about the 26th of March. A. That is correct.

Q. And that is the day that an attempt was made to serve Mr. Dennis? A. That is correct.

Q. And you directed Mr. Stripling to prepare a subpoena? A. That is correct.

Q. I thought you said the subpoena was prepared five or six or nine days before? A. No; I signed the subpoena eight or nine days before.

Mr. McCabe: I would like to ask the reporter to go back. My recollection is quite clear. I asked Mr. Thomas when the subpoena was prepared. He said he was not sure as to the date; five or six or seven
252 days before. I asked him if he was quite sure that it was prepared before the date of the meeting.

The Court: The jury will remember, and you may refresh their recollections when you sum up and get certified copies of the reporter's transcript for that purpose.

By Mr. McCabe:

Q. Now, you say, Mr. Thomas, this subpoena, this white paper, Government Exhibit 9, was actually served upon Mr. Dennis? A. That is correct.

Q. Is it customary to serve the original of a subpoena on a witness? A. Well, this original was served upon Mr. Dennis.

Q. Was there any particular reason why in this particular case the original was served and not the copy? A. Both are signed by me.

Q. Why was the original served? A. I did not say that the copy was not served.

Q. Will you say now that it was served? A. I say no; I am not saying anything about the copy. I said that I saw the white subpoena served. He could have kept the red one under the white one, as far as I could see.

Q. Mr. Thomas, this subpoena, I think you have testified, was served by Mr. Stripling on Mr. Dennis imme-

diately before the adjournment of the session of
253 your committee? A. At which Mr. Dennis was the witness, that is correct.

Q. That was on the 26th? A. That is correct.

Q. I think you testified that you saw Mr. Stripling serve the subpoena, that Mr. Stripling reported to you that he had served it, and that you then adjourned the meeting?

A. That is correct.

Q. No question about that? A. That is correct.

Q. Did you receive from Mr. Dennis a letter explaining his non-appearance at the meeting of April 9, 1947?

Mr. Fihelly: We object, Your Honor. It is the same matter that Your Honor ruled on this morning.

The Court: That same letter?

Mr. Fihelly: The same letter.

Mr. McCabe: Yes, that same letter.

The Court: I will let him answer yes or no. That is all his question contemplates so far.

The Witness: That letter was mailed by Mr. Dennis on April 8, as I recall; is it not?

By Mr. McCabe:

Q. Yes, it is under April 8. A. And it arrived in Washington April 9.

254 Q. I will show you what has been marked for identification as Defendant's Exhibit 1. I do not know whether this is a carbon copy or not (handing a document to the witness). A. I know that one. This letter arrived in Washington on April 9. I arrived in Washington from my home in Allendale, New Jersey, the morning of April 9. I came down on the midnight train. I was taken ill on the way and went up to my home here in Washington, D. C., and consequently did not attend that meeting, nor did I see that letter.

Q. Did you ever see the letter? A. I might have seen it since; I don't recall.

By the Court:

Q. What is the answer? A. I might have seen it since; I don't recall.

By Mr. McCabe:

Q. Well, you stated to me that you were familiar with the letter when I handed it to you now. A. Oh, yes, I am very familiar. It has been in the press. It is the same statement he gave to the press, and the members of the committee have spoken about it.

Q. Now, do you have the original letter? A. Do I have the original letter?

Q. Yes. A. I will see.

Yes; here is the original letter and the statement
235 attached. Do you want the statement, too (producing document)?

Q. Not at the present time. Will you hold it available?

Mr. McCabe: If the Court please, I should like now to offer this original letter—

Mr. Fihelly: May this be stated at the bench?

Mr. McCabe: I won't go into the contents of the letter. I would like to offer or have this marked for identification in place of the copy which I offered before. I think this is on the letterhead of the Communist Party and is the best evidence, if Your Honor rules that it is admissible.

The Court: I do not understand you. Are you offering it in evidence or are you asking that it be marked for identification?

Mr. McCabe: Well, for the present time, we are still in the Government's case. I think I am restricted to having it marked for identification.

The Court: I should think so. You are asking that it be substituted for Defendant's Exhibit 1 for Identification, previously shown to the Court at the time I ruled this morning on these questions?

Mr. McCabe: That is correct, Your Honor.

Mr. Fihelly: We object to that, Your Honor, because they are two different matters. One came into the committee. One came in addressed to the chairman of the committee. One has already been marked by Your
 256 Honor in connection with Your Honor's ruling, and I think that should stay in the case. If he wants to put in another, give it a different mark.

Mr. McCabe: I have no objection to the suggestion of my friend, and I therefore ask that this letter be marked, consisting of 11 pages, under date of April 8, 1947, together with the registry envelope, for identification.

The Court: The next number, Mr. Clerk. Mark the envelope "A".

(Documents referred to were marked Defendant's Exhibits 4 and 4-A for identification, respectively.)

By Mr. McCabe:

Q. Now, Mr. Thomas, I believe you said you had also with you a statement prepared by the defendant or submitted by the defendant; is that correct? A. Yes. I went to the files the other day and got out this letter, and there was attached to it a statement submitted by the defendant, and this statement is dated April 8th, which was given to the press, I think, on that date.

Mr. McCabe: If Your Honor please, I will ask that this be marked for identification.

The Court: Very well; give it the next number.

(Document referred to was marked Defendant's Exhibit 5 for identification.)

By Mr. McCabe:

257 Q. Mr. Thomas, did you transmit to Congress, along with your other statements of the facts on which you based your request, that Congress refer the matter of the alleged contempt of Mr. Dennis to the Attorney General— A. That is correct.

Q. Did you submit along with that report—

Mr. Fihelly: To the United States Attorney.

Mr. McCabe: To the United States Attorney for the District of Columbia; that is correct.

By Mr. McCabe:

Q. Did you submit along with that report Mr. Dennis' letter? A. I do not recall having done that. I do not recall having done that.

Q. Will you think just a moment? A. I am thinking. I do not recall.

Q. Would you say that you did not report it? A. You want to remember the letter arrived and I was not active on the committee. I was ill at that time. So I know very little about the letter.

Q. Well, I will refer to Government's Exhibit No. 7, under date of April 10, 1947, which sets forth that Mr. Thomas of New Jersey, from the Committee on Un-American Activities, submitted the following report citing Eugene Dennis, also known as Francis Waldron.

258 A. That is right.

Q. Did you present that report on April 10? A. That is right.

Q. In connection with that report, did you refer to the House of Representatives the letter of explanation which Mr. Dennis had submitted? A. No; I do not recall having done it, no.

Q. Would you say that you did not do it? A. I would say I do not recall having done it.

Q. Would you say that you might have done it? A. My guess is that I did not do it. You would know it; you have got it right there.

Q. And if this report which I, at any rate, agree is an accurate report, does not show the reference of the letter to Congress, would you say then that the letter was not referred to Congress? A. What was your question again?

Mr. McCabe: Will you read it again?

(The last question was read by the reporter.)

The Witness: Yes.

By Mr. McCabe:

Q. Was the statement which you produced here today as made by Mr. Dennis referred to Congress? A. I do not recall having referred it.

Q. And if it does not appear in this record of your 259 report, you would say that you had not? A. That is correct.

Q. Do you recall when George Sylvester Viereck was subpoenaed by one of your predecessor committees in August of 1938?

Mr. Fihelly: We object, Your Honor, as irrelevant and immaterial.

The Court: Sustained.

By Mr. McCabe:

Q. Did Mr. Viereck appear before your committee in response to a subpoena?

Mr. Fihelly: We object, if Your Honor please.

The Court: Sustained.

Mr. McCabe: Will Your Honor grant me an exception?

By Mr. McCabe:

Q. Was Mr. Viereck ever cited for contempt?

Mr. Fihelly: We object, if Your Honor please. It has nothing to do with the issue in this case.

The Court: Sustained.

Mr. McCabe: Will Your Honor grant me an exception?

The Court: Yes.

Mr. McCabe: Your Honor, I do not want to press the issue unduly—

Mr. Fihelly: Do you want to make an offer at the bench, if it is along the same lines?

260 Mr. McCabe: It is simply along the same lines with reference to three other persons.

The Court: Suppose you come to the bench, so your record will be complete.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: With reference to Viereck, I might as well complete what I was going to say. I propose to ask him whether or not he is aware of the fact that shortly after a subpoena was served on Mr. Viereck, Mr. Viereck went over to Germany to transact certain business with Mr. Hitler. I propose to ask him whether he ever prosecuted Viereck for contempt. I propose to ask him whether or not he is aware that Mr. Viereck was subsequently sent to jail on other charges.

I propose to ask him if he recalled a man named William Dudley Pelley; whether Mr. Pelley was subpoenaed in the summer of 1939; whether he ever proceeded against Mr. Pelley for failure to appear before the committee; and whether, when Mr. Pelley finally appeared in January or February, 1940, he raised any question with Mr. Pelley about Mr. Pelley's ignoring the subpoena; that Mr. Pelley was subsequently convicted for sedition.

I propose to ask him whether he recalls that Edwin James Smythe ignored his subpoena. Mr. Smythe was head of the Protestant War Veterans of the United States and was subpoenaed, I believe, on July 4, 1941. I propose to ask him whether Mr. Smythe was ever prosecuted for ignoring the subpoena.

I think that is all there is.

Mr. Fihelly: The Government objects to each and all of the questions, Your Honor.

The Court: Objection sustained. Exception noted.

(Counsel resumed their places at the trial table, and the following occurred:)

By Mr. McCabe:

Q. Mr. Thomas, do you recall addressing the eighteenth annual meeting of the Allied Patriotic Societies, Incorporated, at the Hotel Commodore in New York?

Mr. Fihelly: When?

Mr. McCabe: December 12 or 11, 1939.

Mr. Fihelly: We object, if Your Honor please. It has nothing to do with the issues in this case.

The Court: That is a preliminary question. He can answer it yes or no.

The Witness: I remember addressing some organization in the Commodore Hotel about that time.

By Mr. McCabe:

Q. Do you recall saying there—

Mr. Fihelly: Just a moment. I object to anything that was said there. It has nothing to do with the issue
262 in this case.

Mr. McCabe: I think it goes to the credibility of this witness with respect to some of the things he said today about subversive activities.

The Court: I will have to hear the question before I can rule on it.

Mr. Fihelly: May it be offered at the bench, Your Honor?

The Court: Very well.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: The question is, Do you recall saying at that time that Bunds, Silver Shirts, White Camelias, and other anti-Jewish organizations are not to be worried about?

The Court: Do you object?

Mr. Fihelly: I object.

The Court: I sustain the objection.

Mr. McCabe: I was going to ask: Do you remember making a speech over the Columbia Broadcasting System on June 9, 1940—and in order to avoid the duplication of questions, I will put it all in one question, so the objection can be made—in which you said:

“The Fifth Column in the United States has flourished under New Deal rule. . . . In some respects it is synonymous to the New Deal, so the surest way of removing

the Fifth Column from our shores is to remove the
263 New Deal from the seat of Government. We must
do this if we hope to rebuild our Army and Navy
to the proper level"?

Mr. Fihelly: We object to it, Your Honor.

The Court: The objection will be sustained. Exception noted.

(Counsel resumed their places at the trial table, and the following occurred:)

264 Q. Do you recall, Mr. Thomas, when Fritz Kuhn, the leader of the Bund in the United States, spoke in glowing terms of the Dies Committee of which you were a member?

Mr. Fihelly: If the Court please, we object to the question, irrelevant and immaterial.

The Court: Objection sustained.

Mr. McCabe: Your Honor will grant me an exception?

By Mr. McCabe:

Q. Do you recall when Mr. Rankin, one of your colleagues, stated, I believe before Congress—

Mr. Fihelly (interposing): If Your Honor please, I think they are following statements along this line that we just had at the bench, and he ought to offer them to the Court because he knows as a lawyer that they are not evidence in any event, and in all fairness they ought to be stated at the bench.

Mr. McCabe: This goes directly—

Mr. Fihelly: Yes, it goes directly to the issues in the case.

Mr. McCabe: I take it, Mr. Fihelly, you are unduly alarmed at what I was about to say.

Mr. Fihelly: I take it you were going to be consistent.

By Mr. McCabe:

Q. I take it that the committee is a grand jury?

265 Mr. Fihelly: We object to the question, irrelevant and immaterial.

The Court: Objection sustained.

Mr. McCabe: That is all, we offer it as showing it as an investigating committee it is not within the purview of the House committee. That was the sole purpose of that.

By Mr. McCabe:

Q. Mr. Thomas, you testified regarding the personnel of your committee. I believe you identified documents setting forth that personnel.

Has your committee ever taken any steps to consider the right of Mr. Rankin, in view of his election, allegedly in violation of the Fourteenth Amendment to the Constitution, to sit as a member of the committee?

Mr. Fihelly: We object as irrelevant and immaterial, and I think the question is highly improper in view of Your Honor's ruling this morning on defense number 1 document.

The Court: If you will finish the question I will rule on it.

Mr. McCabe: I had finished the question.

The Court: Objection sustained.

Mr. McCabe: Will Your Honor grant me an exception?

Will Your Honor indulge me just a minute? I am pretty nearly through; there may be a couple of other things.

By Mr. McCabe:

Q. Mr. Thomas, among the names contained in your files of persons suspected of subversive activities
266 do you have the names of Eleanor Roosevelt—

/Mr. Fihelly: Just a minute.

By Mr. McCabe:

Q. Harold Ickes—

Mr. Fihelly: Just a minute.

The Court: You have gone far enough on that.

Mr. Fihelly: I think that anything further ought to be made at the bench and not offered like that.

The Court: You are objecting to that?

Mr. Fihelly: I am objecting to it and say it is highly improper.

Mr. McCabe: I should like to make my offer.

The Court: You may come to the bench.

(Counsel for both sides approached the bench and the following occurred:)

The Court: Now, you may finish your question.

Mr. McCabe: This witness has testified as to his definitions of un-Americanism, and so forth, and I propose to ask him whether or not he had, and has, in his files a person suspected of subversive or un-American activities, a person named Henry Agard Wallace, former Vice President of the United States;

The name of Archibald McLeish, former Librarian of Congress;

267 The name of John Dewey, president emeritus of philosophy at Columbia University;

The name of Francis J. McConnell;

The name of Harlow Shaply, professor of science at Harvard University;

The name of Albert Eistein, scientist and physicist;

The name of Chester Bowles, former Administrator of the Office of Price Administration;

The name of David Lilienthal, now Chairman of the Atomic Control Commission;

The name of Edward Warren, Chief of the United States Conciliation Service;

The name of Elmer Benson, former Governor of the State of Minnesota;

The name of Culbert Wilson, former Governor of the State of California;

The name of Sheridan Downey, United States Senator from California;

The name of Frances Perkins, former Secretary of Labor, now Chairman of the Civil Service Commission;

The name of Paul Robeson;

The name of Upton Sinclair, the American novelist;

The name of Leon Henderson, former Administrator of the OPA.

I have already asked about Eleanor Roosevelt
268 and Harold Ickes, I believe.

I want to ask him if the name of Shirley Temple, the motion picture actress, is in his files; the name of Charles Chaplin, and I then propose to ask him whether or not his committee has pursued a practice of intervening in labor disputes by calling meetings concerning certain unions at a time when those unions were engaged in hearings before the National Labor Relations Board involving their right to represent workers at the plants involved.

I propose to ask him whether or not at the time that Elmer Benson was candidate for Governor, against Harold Stassen he did not call meetings of his committee and publicize various actions of Elmer Benson, and criticize them as sympathetic to the Communist Party just prior to the election, and I propose to ask him whether or not at the time that Governor Murphy of the State of Michigan was a candidate for reelection, I believe it was of Governor, I haven't the material before me, he did not publicize certain testimony before the then committee, the predecessor committee, accusing Murphy of having consulted with communists during sit-down strikes in Detroit.

I propose to pursue that general line of questioning with regard to the activities of the committee to show that their real purpose was to introduce questions in so-called progressive affairs.

Mr. Fihelly: We object to each and all of the
269 questions on the ground that it is immaterial and irrelevant.

The Court: The objection is sustained.

Mr. McCabe: Exception.

I think that that is pretty well covered here anyway; I think we are through.

The Court: You can consult with your associates.

(Counsel returned to the trial table and the following occurred:)

The Court: Resume the stand, Mr. Thomas.

(The witness resumed the witness stand.)

Mr. McCabet: If Your Honor please, I think I have completed my cross examination of this witness. It may be that under certain developments in the case we should like to call Mr. Thomas as a witness for the defense, and I take the liberty of assuming that Mr. Thomas will try to adjust his business to accommodate us.

The Witness: I will be very glad to.

Mr. Fihelly: I have only two questions, if Your Honor please, on redirect examination.

Redirect examination.

By Mr. Fihelly:

Q. The first question, Mr. Thomas; you mentioned the subpoena which was served on the defendant was made out during the testimony of a witness named Smith or Schmidt? A. Schmidt.

270 Q. And at what stage of the hearing was it on March 26 he started to testify? A. He started to testify about 10 o'clock in the morning.

Q. Was it before or after Dennis? A. Before.

Q. Was it just before? A. Just before.

Q. Another question with reference to the use of your mother's name; will you explain to the jury the situation under which that change occurred? A. Well, my mother's name was Georgianna Thomas, and my father was John Parnell Feeney.

My father died when I was nine or ten years of age. From that time on I was brought up by my widowed mother, Georgianna Thomas. I knew only—we moved away then, she couldn't afford to live in the city and we moved out in the country. I got to know only my mother's family, or rather I was brought up by my

widowed mother and her sister. I got to know only the Thomas side of the family, and I suppose over a period of time they influenced me as a boy to take the name, their name, so that I would help perpetuate their family. I went to war, and while I was at war over in France in the trenches I thought a lot about it.

Mr. McCabe: While we are interested in this personal history, I do not think there is any implication as to whether or not Mr. Thomas had used another name.

Mr. Fihelly: Why did you ask him then?

Mr. McCabe: He had asked about other names of witnesses.

Mr. Fihelly: I thought so.

The Court: I think he may explain. I do not know that he needs to go into any great detail.

The Witness: So then I came back from the war with my mind fully make up to take my mother's name, and so I went to a lawyer in New York named Charles Caldwell, who went to court with a petition in White Plains, Westchester County, and the court permitted me to take my mother's maiden name of Thomas.

Mr. Fihelly: That is all.

Recross examination.

By Mr. McCabe:

Q. What business were you in, Mr. Thomas, at the time you changed your name? A. If I was in any business it was just after the war and wasn't too much of a business. I started in as a bond salesman for Kuntz Brothers at \$12.50 a week. It wasn't much of a business.

Mr. McCabe: That is all.

The Court: You are excused.

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275

Robert E. Stripling

was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Fihelly:

Q. Mr. Stripling, will you state your full name for the record, sir? A. Robert E. Stripling, S-t-r-i-p-l-i-n-g.

Q. What is your occupation at this time and what has it been during this year 1947? A. I am the clerk and chief investigator of the Committee on Un-American Activities, U. S. House of Representatives.

Q. And were you present at the meeting of that committee which was held in its chambers in the District of Columbia on March 26 of this year? A. I was.

Q. Did you see there, that day a man named Eugene Dennis? A. I did.

Q. Do you see him in the courtroom, Mr. Stripling? A. Yes, I do.

Q. Will you point him out, sir? A. Mr. Dennis 276 is sitting by Mr. Brodsky and Mr. McCabe, in the brown striped suit.

Mr. Fihelly: May the record show the defendant has been identified, may it please Your Honor?

The Court: Yes.

By Mr. Fihelly:

Q. Will you state to His Honor and the members of the jury just what took place in connection with this meeting while you and Mr. Dennis were at that committee meeting on March 26? A. Mr. Dennis was called as the next witness by the chairman of the committee, Mr. Thomas, at approximately 11:30. Mr. Dennis approached the witness stand, was sworn—

Q. By whom? A. By the chairman.

He was then seated, and the chairman directed me to begin the examination.

I asked Mr. Dennis to state his name for the record.

He replied, "Eugene Dennis."

I asked him then to state his name for the record.

He replied, "Eugene Dennis."

I asked him if that was his full name or his real name.

Whereupon Mr. Dennis stated that he was there as Eugene Dennis and that he would testify under the name of Eugene Dennis.

277 As I recall, the chairman then asked Mr. Dennis to state his name.

Through an exchange of questions on the part of the chairman and other members of the committee, which I will say lasted for five minutes, Mr. Dennis refused to state—

Mr. McCabe: That is objected to, Your Honor.

The Court: Sustained.

By Mr. Fihelly:

Q. Did he during that five minutes state his name? A. The only name that Dennis stated was that of Eugene Dennis.

Q. How many times do you recall that Mr. Thomas asked him to state his name, or questions of that substance? A. I would say five or six.

Q. Did any other member of the committee question him with respect to what his real name was? A. Yes.

Mr. McCabe: That is objected to as calling for a conclusion as to the definition of a real name.

The Court: Sustained.

By Mr. Fihelly:

Q. Did any member of the committee ask him under what name he was born? A. Yes; yes; Congressman J. Hardin Peterson, of Florida, member of the committee, asked him.

278 Q. Did the defendant Mr. Dennis answer that question propounded by Mr. Peterson, a member of the committee? A. He did not.

Q. Did he give any name to any of the three of you who questioned him, other than Dennis? A. No, sir.

Q. What happened after that, if you recall, in connection with this case and its general subject matter, Mr. Stripling while the defendant was there? A. I then—The chairman asked me if I had any further questions.

I asked Mr. Dennis when and where he was born.

Mr. Dennis refused to answer that question.

The chairman then explained to him that the committee would be glad to hear him, to give him the two hours which he had requested, but that he must cooperate with the committee.

I explained to the committee that it was necessary that we know the real name of the witness, that he be identified.

Since he did not identify himself, the chairman then directed me to serve a subpoena upon Mr. Dennis.

Q. Did you serve a subpoena on Mr. Dennis? A. I did.

Q. Just tell His Honor and the members of the jury what you did in that connection. A. As I recall,
279 the chairman asked Mr. Dennis again to state his name.

Mr. Dennis replied something to the effect, "My hair is brown, my eyes are blue," and when he said that, the chairman says, "That will be all. Serve a subpoena upon this man."

Whereupon I stepped down from the bench where I was sitting and approached Mr. Dennis to serve the subpoena.

Q. I show you Government 9, which has been admitted in evidence, and ask you to look at that and state whether you have ever seen it before, Mr. Stripling (handing a document to the witness). A. Yes, I have.

Q. When and where did you first see that, sir? A. On March 26.

Q. Is that the paper that you served on Mr. Dennis?
A. It is.

Q. Now, tell His Honor and the members of the jury, from the time that you started down to approach Mr. Den-

nis, everything that you did in connection with serving that paper on the defendant. A. Upon direction of the chairman to serve the subpoena, I stepped down and approached Mr. Dennis.

As I was about five feet away from Mr. Dennis, Mr. Dennis stood up and he said, "In the name of the American people, I hold this committee in contempt."

I walked up to Mr. Dennis and handed him this
280 subpoena, held it in front of him.

I said, "Mr. Dennis, I have a subpoena here for you to appear on April 9."

Mr. Dennis turned his head to the right and said, "What the hell is that?"

I repeated, "I have a subpoena here for you, Mr. Dennis," holding it out.

Mr. Dennis sought to ignore me.

Mr. McCabe: That is objected to.

The Court: Sustained. It will be stricken.

Mr. Fihelly: No objection to that.

By Mr. Fihelly:

Q. Just what he did; no conclusion, Mr. Stripling. A. I again said to Mr. Dennis, "I have a subpoena here for you."

I asked him to take it.

Then I directed myself to the chair, the chairman of the committee, and I said, "Mr. Chairman, I would like for the record to show that this witness is being served with a subpoena."

The Chairman says, "The record will so show."

Mr. Dennis had folded his arms. Whereupon I laid the subpoena upon his arms. He turned and walked away from the witness stand with the subpoena on his arms.

Q. Will you just lay the subpoena down and show the jury in what manner the defendant had folded
281 his arms when you laid the subpoena on his arms?

A. As I recall, it was something like this (indicating).

Q. Will you hold your arms there? And it was in that position that you laid the subpoena on his arms; is that right? A. That is right.

Q. Did you lay it on in such a way that it remained there, or did it slide off to the floor? A. It remained on him arms while he was standing, and as he walked away and as I last saw him, he had the subpoena on his arms.

Q. Was there a man named Mr. Nellor present at the committee hearings on that day?

Mr. McCabe: Objected to as irrelevant.

The Court: I sustain the objection on the ground that it is leading. You may ask who was present.

By Mr. Fihelly:

Q. What members of the press do you recall were present at the committee meeting on this particular day, if you recall any of them, Mr. Stripling? A. Yes, I recall some. There were, I would say, fifty members of the press present, however. I can't recall some of them.

Q. Will you mention some of the names you recall?
282 A. Mr. Ed Nellor, of the New York Sun, was present, Mr. Douglas Cornell, of the Associated Press was present, Mr. Tony Demma, assistant superintendent of the House Press Gallery was present.

Q. But there were a large number of others present? A. Yes.

Q. You are sure of those that you mentioned were present? A. Yes, I am sure.

Q. Now, after the subpoena was served on Mr. Dennis when did you see it again, Mr. Stripling? A. I saw the subpoena again about, I would say, three or four minutes later.

Q. Where was that? Just where was the subpoena when you saw it? A. The subpoena was on a table in the committee room, being examined by members of the press.

Q. Did you later receive that subpoena from one of the members of the press? A. I later received this subpoena

from the assistant superintendent of the House Press Gallery, Mr. Tony Demma.

Q. Now, I show you Government 10 for identification and ask you to look at that and state whether or not you have ever seen that before (handing a document to the witness).

Mr. McCabe: That is objected to, Your Honor, inas-
much as the admission of that has been re-
283 fused.

Mr. Fihelly: It has not.

The Court: It was refused on the evidence so far, yes.

Mr. Fihelly: At that time, yes.

Mr. McCabe: Will Your Honor grant me an excep-
tion?

Mr. Fihelly: In fact, Your Honor said there may be later witnesses. I told Your Honor there could be.

The Court: Of course, the only question is whether he has ever seen it before. I overrule your objection to that.

Mr. McCabe: I see.

The Court: If you have an objection to the next question which I suspect will be forthcoming, you may do so, so your record will be clear.

Mr. McCabe: Yes, sir.

The Witness: I have seen this, yes, sir.

By Mr. Fihelly:

Q. When and where did you first see that, sir? A. I first saw this subpoena on March 26.

Q. Now, I call your attention to the writing which appears on the back of this subpoena. Whose writing is that, sir? A. That is my own writing.

Q. When did you put that writing on there, Mr. Strippling? A. At approximately 11:40 or 11:45 on March 26.

Q. With respect to the service of Government 9, did
284 you put that writing on before or after this paper, Exhibit 9, was served? A. I put it on after this paper was served.

Q. State whether or not the writing on 10 refers to the service of 9. A. It does.

Mr. Fihelly: We offer this in evidence, if Your Honor please.

Mr. McCabe: It is objected to.

The Court: On what ground?

Mr. McCabe: On the ground that the paper handed up is a copy of the subpoena alleged to have been served on this defendant; bears on its face evidence that it is not a copy of the subpoena. A simple comparison of the alleged copy with the alleged original shows discrepancies which render it inadmissible as a copy of the subpoena served.

The Court: He has not said it was a copy.

Mr. McCabe: Does Your Honor overrule my objection on the ground that I am not permitted to use, in arguing against the admission of the paper, the title of the exhibit as printed?

The Court: I have not ruled at all. I am asking you what your objections are.

Mr. McCabe: All right. Now, my first objection is that this paper, which bears on it a title called "Copy"—
285 Exhibit 9 bears on it—Do you have it, Mr. Fihelly?

Mr. Fihelly: Right here (handing a document to Mr. McCabe).

Mr. McCabe: —bears on it, in the place where on Exhibit 10 the word "Copy" appears, the word "Original."

Apart from that the printed matter on Exhibit 9 is a reproduction of the printed matter on Exhibit 10.

Now, I say that when an exhibit is offered and bears upon the exhibit a certain title, I am entitled to call the attention of the Court that what purports, by the Government's own statement, to be a copy of another exhibit is not a copy, and therefore it is inadmissible in evidence.

The Court: May I see it? The clerk will hand it up to me.

(A document was handed to the Court.)

The Court: What do you have to say, Mr. Fihelly?

Mr. Fihelly: I say that the argument he is making is an argument he can address to the jury, if he wants to. The original, 9, the white paper, was served. The pink paper is only a return, we will show, made by Mr. Strippling, showing that the original of that particular subpoena had been served.

The Court: Well, Exhibit No. 10 for identification, so far as I have heard the evidence, has never been brought home to this defendant. He has never seen it. He has never been examined on it. I cannot see that it is admissible against him, unless you claim it is a public property kept in the due course of business.

Mr. Fihelly: I do so claim—a regular return made by the committee, made by this investigator.

The Court: I had not heard that.

Mr. Fihelly: I thought it was one of those *res ipsa loquitur* things, Your Honor. I thought it spoke for itself, because of the seal. We do have in evidence that Mr. Thomas, as chairman, directed him to serve it, and I will bring out, if it has not already been brought out, that pursuant to the direction, he made that return on the pink copy.

The Court: I think the shop book statute requires that it be made in the usual course of business and that it was pursuant to proper authority. Those things have not been brought out, unless I missed something in the testimony.

Mr. Fihelly: I think Your Honor is right in that.

The Court: All right.

Mr. McCabe: Then the offer is withdrawn temporarily, I assume?

The Court: Temporarily.

Mr. Fihelly: That is right. I am going to ask further questions on it and lay the proper foundation.

By Mr. Fihelly:

Q. With respect to subpoenas which have been served by you during 1947 and the life of this present Commit-

tee on Un-American Activities, state whether or not
 287 it had been your custom to serve the original on the
 witnesses. A. I always serve the white copy or the
 original.

Q. And what, if anything, was done in the manner of
 making a return as to the service of the white? A. The
 return is made on the pink copy.

Q. Had that always been the custom during 1947 and the
 life of this committee? A. That has always been my
 custom.

Q. I show you this Government 10 and ask you whether
 you made that return on 9 in the regular course of your
 business as chief investigator of the committee, pursuant
 to request of the chairman to make a service of number 9
 (handing a document to the witness). A. I did.

Mr. Fihelly: We renew our offer, if Your Honor please.

The Court: Do you still object to this?

Mr. McCabe: No; I have no objection.

The Court: It will be received.

(Government Exhibit 10 for identification was received
 in evidence.)

Mr. Fihelly: May it be read to the jury, if Your Honor
 please?

Government 10, ladies and gentlemen of the jury:

288 "Copy, by authority of the House of Representatives
 of the Congress of the United States of America,
 to Robert E. Stripling. You are hereby commanded
 to summon Eugene Dennis, also known as Francis
 Waldron, General Secretary, Communist Party of the
 United States, to be and appear before the Un-American
 Activities Committee of the House of Representatives of
 the United States of which the Honorable J. Parnell
 Thomas is chairman, in their chamber in the City of
 Washington, on the 9th day of April, 1947, at the hour
 of 10 a. m., then and there to testify touching matters of

inquiry committed to said committee; and he is not to depart without leave of said committee.

"Herein fail not, and make return of this summons.

"Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this 26th day of March, 1947.

"Attest"—no name—"Clerk." Seal of the House. "J. Parnell Thomas, Chairman."

On the back of the subpoena appears:

"Copy, subpoena for"—and in longhand, in ink—"Eugene Dennis, also known as Francis Waldron." A form, and typed, "Before the Committee on the"—in longhand—"Un-American Activities, U. S. House of Representatives. Served"—this is a blank form—"at 11:35 a. m., March 26, 1947, in the committee's chambers, in Washington, D. C. Robert E. Stripling, chief investigator, Committee on Un-American Activities" 289 (handing a document to the jury).

Mr. McCabe: I ask Your Honor that the jury be cautioned at this time that this is a physical exhibit and its evidential quality is restricted to the fact that Mr. Stripling wrote that on there and is of itself no evidence that he performed the acts or made service which he has stated he made.

He has put on that exhibit a conclusion that he served the defendant. Now, I ask that the jury be cautioned that that in itself is no evidence that he did serve the defendant.

The Court: You mean that you feel that "serve" is a word of art; is that it?

Mr. McCabe: Yes, and a conclusion.

The Court: I prefer that you bring that up, if you will, by appropriate prayer. I think it would be confusing at this time to instruct the jury on that point.

Mr. McCabe: Will Your Honor grant me an exception?

The Court: Yes.

By Mr. Fihelly:

Q. Now, on March 26 do you recall whether or not there was a stenographer present taking down the proceedings?

A. Yes, sir, there was.

reporter? A. Yes; Mr. LaCharity, L-a-C-h-a-r-i-t-y.

Q. And has he been in the witness room from time
290 to time, if you know of your own personal knowledge? A. Yes; he was here Monday and Tuesday.

Q. Prior to April 9 did you have occasion to send a wire to Mr. Dennis? A. Yes, I did.

Q. Will you fix the date and state whether or not that was at the instruction of anyone, and if so, whom? A. On April 7 I sent a wire to Mr. Dennis upon direction of the chairman of the committee, Mr. Thomas.

Q. I show you Government 11, which has been introduced in evidence and read to the jury, and ask you whether that is a copy of the wire that you sent (handing a document to the witness). A. Yes, sir.

Q. Now, getting down to April 9 of this year, was there a committee hearing of the Un-American Activities Committee on that particular date? A. There was, yes.

Q. Who presided at that meeting, if you recall? A. Honorable Karl E. Mundt.

Q. Is he a Member of Congress? A. He is from South Dakota.

Q. What State? A. South Dakota.

Q. Was Mr. Thomas, the chairman, at any time
291 there during that meeting, if you recall? A. He was not.

Q. If not, do you recall where he was?

Mr. McCabe: I object.

Mr. Fihelly: I won't press it, if you object, sir. I am sorry, sir.

By Mr. Fihelly:

Q. Was there a quorum present when that meeting started? A. There was.

Q. What happened after the meeting started in connection with the subpoena which had been served, as you claim it was, on Mr. Dennis? A. Mr. Mundt, who was presiding, asked that the first witness, Mr. Eugene Dennis, come forward. Mr. Eugene Dennis' name was called out. Mr. Dennis did not come forward. I then repeated the name of Eugene Dennis.

Q. Did Mr. Dennis appear at any time during that meeting? A. Mr. Dennis did not appear.

Q. Did he ever appear at any time before the Committee on Un-American Activities after March 26? A. No, sir.

Mr. Fihelly: May I just check my notes, Your Honor? I think I have about everything.

By Mr. Fihelly:

292 Q. With respect to the serving of the subpoena, state whether or not you had authority to serve subpoenas, Mr. Stripling.

Mr. McCabe: That is objected to as calling for a conclusion; also as leading.

The Court: What about it, Mr. Fihelly?

Mr. Fihelly: I say this, Your Honor: Resolution 601 itself says that anyone can be served——

Mr. McCabe: That is in evidence. This witness certainly cannot add any authority to the resolution.

By Mr. Fihelly:

Q. You were instructed by the chairman to serve the subpoena?

Mr. McCabe: That is objected to as leading.

Mr. Fihelly: That is already in evidence.

Mr. McCabe: Why bring it in again?

Mr. Fihelly: Well, I am sorry to hurt you, Mr. McCabe.

The Court: I will let you ask what instructions were given him by the chairman of the committee with reference to serving subpoenas or to appear.

Mr. Fihelly: That is all I want, Your Honor.

The Court: Very well.

By Mr. Fihelly:

Q. What general instructions were given you by the chairman of this committee, Mr. Thomas, with respect to serving subpoenas on witnesses who testify before the committee? A. The resolution——

The Court: No.

By Mr. Fihelly:

Q. No. Did you receive instructions from the chairman generally with respect to serving them? A. I did.

Q. What instructions did you receive, sir. A. The chairman told me to serve a subpoena upon Mr. Eugene Dennis.

Q. Had you received similar instructions by the chairman on other occasions? A. Not this particular chairman; no, sir.

Q. Was that the custom? For one of the investigators to receive instructions from the chairman or a member of the committee and to serve subpoenas? A. It was.

Q. Had that custom always been followed? A. It had.

Q. What matters were being considered by the Committee on Un-American Activities on April 9 of this year? A. The activities of the Communist Party of the United States.

Q. Do you know, Mr. Stripling, whether or not there were sound movies taken in connection with the service of the subpoena on this defendant and other matters that took place during his testimony?

Mr. McCabe: That is objected to, both as irrelevant and as leading.

The Court: What is its relevancy, Mr. Fihelly?

Mr. Fihelly: Its relevancy is it is another form of corroborative proof to show that the defendant was served. You have a picture of it. You have what was said to him.

The Court: Do you expect to offer that in evidence?

Mr. Fihelly: I am going to make a tender to the Court and to defense counsel that they know it is there, if it becomes pertinent in the case.

The Court: Overruled.

Mr. Fihelly. I did not want to press it at this time, but to show that there is that available, if it is necessary.

Will you read the last question?

The Reporter (reading): "Do you know, Mr. Stripling, whether or not there were sound movies taken in connection with the service of the subpoena on this defendant and other matters that took place during his testimony?"

The Witness: May I answer?

By Mr. Fihelly:

Q. Yes. A. Yes, there were.

295 **Q. By what particular concern were they taken, if you know, sir? A. Paramount Newsreel, Universal, and I believe it was Movietone. There were three different cameras set up taking moving pictures of it.**

Q. And particularly in connection with Paramount, have you seen the sound reel that they took at that particular time? A. I have.

Q. Is that available if the Court or jury needs it? A. It is.

Mr. Fihelly: Your witness.

Cross Examination

By Mr. McCabe:

Q. Mr. Stripling, how long have you been an employee of the House Committee on Un-American Activities? A. Since January 22, 1947.

Q. How old are you? A. Thirty-four.

Q. What was your previous employment? A. I was in the Army.

Q. For how long were you in the Army? A. Eighteen months, six days.

Q. As a matter of fact, you asked deferment from your Army service, didn't you?

296 **Mr. Fihelly: If Your Honor please, that is a blow below the belt. That is highly improper.**

The Court: Do you think that affects his credibility?

Mr. McCabe: If it tends to degrade him, I think it can be asked, but he made the point of being in the Army, and I think I have a perfect right to ask him whether his being in the Army was not against or over his efforts to avoid being in the Army. I think I have a right to show that a man who wraps a flag around him——

The Court: He may answer the question.

The Witness: I would like to ask to have the question repeated.

The Court: Very well.

Mr. McCabe: Will the stenographer read it?

(The last question was read by the reporter.)

The Witness: My employer asked for my deferment.

By Mr. McCabe:

Q. You finally went in the Army? A. I was in the Army.

Q. And before that what was your employment? I was secretary and chief investigator of the Special Committee on Un-American Activities, U. S. House of Representatives.

Q. Were you ever employed by the FBI? A. No, I was not.

297 Q. Never in any capacity whatsoever? A. None whatsoever.

Q. You say you first saw this subpoena on March 26, is that correct, and I am referring now to Government's Exhibit 9 (handing a document to the witness)? A. March 26, yes, sir.

Q. Never seen that before? A. No, sir.

Q. No question in your mind about that? A. None whatsoever, no, sir.

Q. Who prepared it? A. Mr. Louis J. Russell.

Q. Mr. Louis J. Russell prepared that? A. That is right, sir.

Q. Do you know when he prepared it? A. Yes, I do.

Q. When? A. I would say that it was approximately 10:45 on the morning of March 26.

Q. Ten forty-five on March 26? A. That is right.

Q. So that if it were alleged that that subpoena was prepared five or six or ten days before March 26, you would say that that was an incorrect statement, would you? I would.

298 Q. No question about that in your mind? A. None whatsoever.

Q. Were you present when Mr. Russell prepared it? A. No, sir, I was not.

Q. I call your attention on Government's Exhibit 9 to the fact that apparently originally after the word "to" in the direction it was addressed to Louis J. Russell, and over that, in printed script, in ink, is the name Robert E. Stripling. I ask you if you know who made that insertion or correction. A. Yes; Mr. Louis J. Russell.

Q. Do you know when he made it? A. Yes.

Q. When? A. At about 11:32.

Q. And that was the morning of March 26? A. That is right.

Q. Do you know where he made it? A. Yes.

Q. Where? A. He was seated beside me.

Q. This was during a session of the committee? A. That is right.

Q. No question about that? A. I am sorry. I gave a wrong answer.

299 Q. Correct it, if you please. A. Yes, sir. The change in the name from Robert E. Stripling—I mean from Louis J. Russell to Robert E. Stripling was made by Mr. Russell, I would say, at approximately 11 o'clock and not 11:32, as I stated.

By the Court:

Q. Not when? A. Not at 11:32.

Mr. McCabe: Not at 11:32.

By the Court:

Q. Eleven o'clock and not at 11:32? A. That is right.

—By Mr. McCabe:

Q. So that we will have these minutes in mind, you testified with some exactness as to the hour and minute when

you first handed the subpoena to Mr. Dennis? A. That is right, sir.

Q. Now, what was that hour? A. It would have to be approximate.

Q. Yes. We are not pinning you down to minutes. A. I stated I made the return at 11:35. I could not be positive about that.

Q. You wrote on Exhibit 10, the pink slip, and you made your return 11:35? A. That is right, sir.

300 Q. Did you make the return on Exhibit 10, the pink slip, before Exhibit 9 had been delivered to you by one of the newspaper reporters? A. Oh, yes.

Q. Well, now, suppose you describe for us the sequence of events regarding that, starting at the time when you, as you testified, lay Exhibit 9, the original subpoena, in Mr. Dennis' arms. Now, right after that what did you do? A. I turned and walked back to my position at the committee dais.

Q. How far was that from where Mr. Dennis was standing? A. I would say ten feet.

Q. You turned your back to Mr. Dennis, walked away, and then what did you do? A. I gathered up my papers.

Q. Go ahead. What did you do then? A. And prepared to go into my office.

Q. When did you first do anything with reference to Exhibit 10, the pink copy? A. The pink copy—I sat down. As I went into my office, I sat down and wrote the return thereupon.

Q. So that would be within three, four, five, or six minutes, without pinning you down to time, but, nevertheless, that much time intervened between the time you handed it to Mr. Dennis, walked over, gathered your papers,
301 went to your office, and nothing intervened before you picked up Exhibit No. 10 and put on it the writing which now appears on it? A. Well, Mr. Dennis was to testify at 11:30. I assume—I approximate it—that the exchange of questions had taken about five minutes. I did not check my watch, but I put on there 11:35, because I felt

it was about five minutes from the time he appeared until I served the subpoena on him.

Q. Nothing else intervened to extend the time? That is what I am driving at. A. Not that I rec-

Q. I am back again to the time when Mr. Russell wrote in "Robert E. Stripling" there in place of "Mr Russell." Now, with reference to the time when you handed this to Mr. Dennis, when did Mr. Russell make this alteration?

A. I believe I testified that it was about 11 o'clock that Mr. Russell made that alteration.

Q. And that was before Mr. Dennis had been called as a witness? A. That is right.

Q. In other words, a half hour, at less, before Mr. Dennis had been called as a witness, at his own request, you had made up your mind to subpoena him for April 9; is that correct? A. I had not made up my mind.

Q. Who had made up his mind, had Mr. Thomas?
302 A. The chairman of the committee.

Q. Now, when did Mr. Thomas first make known to you that he had made up his mind, before Mr. Dennis was called, that he would subpoena Mr. Dennis to appear on April 9? A. The chairman called me to his place at the committee hearing room I would say approximately 10:45.

Q. And that was during a session of the committee? A. That is right. Mr. Schmidt was testifying, and he directed me to have a subpoena prepared for Mr. Dennis and for me to serve that subpoena.

Q. Now, did you prepare this subpoena? A. I did not.

Q. Did you see Mr. Russell prepare it? A. I did not.

Q. When you first saw the subpoena was it precisely the same condition as you see it now (handing a document to the witness)? No. "Robert E. Stripling," which is written in in longhand, did not appear upon it.

Q. I think you testified that Mr. Russell ~~put~~ that in? A. That is right.

Q. At that time had it been signed by the chairman? A. It had.

Q. In other words, after this had been signed by the chairman, did it have the seal of the committee on it?

303 A. It had—not the committee.

Mr. Fihelly: Seal of the House.

By Mr. McCabe:

Q. That is the seal of the House. And Mr. Russell in your presence made an alteration on it? A. That is right.

Q. Did you have this paper—this precise physical paper—in your possession before the typewritten insertions were made on it? A. Yes.

Q. In other words, did you have a blank subpoena? A. Yes, I did.

Q. Had it already been signed by the chairman? A. It had.

Q. In other words, it was your custom to have in your possession subpoenas signed by the chairman directing either you or Mr. Russell to someone, blank, to be and appear before the—Would it be a blank or would Un-American Activities be filled in? A. The copies of the subpoenas signed by the chairman were prepared in the committee offices, I would say—

Q. That is not responsive to my question, Mr. Stripling. A. I am sorry.

304 Q. I am asking you whether or not these what we are calling blank subpoenas, signed by the chairman, contained the words, “To be and appear before the Un-American Activities Committee.” A. No.

Q. That was not filled in. So that you had in your possession an original. Would you have the copy also? A. Yes, sir.

Q. Were these carbon copies? Is the pink a carbon copy of the original? A. No, it is not.

Q. Are they made up separately? A. You mean before it is made up?

Q. Yes. A. No; it is printed.

Q. I mean when the typewriting is put in. A. Yes.

Q. Do they insert the pink and the white in the typewriter together to make a carbon? A. That is true.

Q. So that when you have these originals signed by the chairman, but blank as to the name of the person subpoenaed, you then at the same time, or somebody on your committee, insert them in the typewriter and type in the name of the person to be subpoenaed; is that correct? A.

That is right.

305 Q. And the committee before which he is to appear? A. That is right.

Q. And also at that time is inserted the name of Mr. Thomas as chairman, and the date and place of hearing; is that correct? A. If the chairman directs it.

Q. Now, then, you say the subpoena which was made up, say, half an hour before Mr. Dennis was called, at his own request, for a meeting on March 26—Did that remain in your possession or Mr. Russell's possession during the half hour? Am I right in saying a half hour? It was made up at 11 and Dennis appeared at 11:30? A. I did not say it was made up at 11.

Q. What did you say? A. I said 10:45, approximately.

Q. Ten forty-five. During the time intervening between the making up and the filling in of this subpoena and the service on Mr. Dennis that you have described, in whose custody was this paper, this Exhibit No. 9 and 10? A. May I explain the physical setup?

Q. Well, you make any explanation you wish after I finish questioning you, but just for the present, I think my question is one which can be answered. A. Well, Mr. Russell was seated by me. Mr. Russell brought the subpoena in. He had it in front of him. The subpoena
306 was resting between Mr. Russell and I on the committee bench, so to speak.

Q. In the committee room or in the anteroom? A. No; in the committee room. The hearing was in progress.

Q. Yes, and it remained there during the entire time which was required for the preceding witness to complete

his testimony and for Mr. Dennis to be called; is that correct? A. That is true.

Q. So that, as you testified, after this passage of words between Mr. Dennis and the committee regarding his name, and Mr. Thomas, I believe you said, served him with a subpoena— A. No, I did not say that.

Q. What did you say? A. I did not say Mr. Thomas served him with a subpoena.

Q. Perhaps I did not make myself clear. What I was trying to say was that Mr. Thomas said, "Serve him with a subpoena"? A. That is right.

Q. Is that correct? A. That is right.

Q. Mr. Thomas said, "Serve him with a subpoena"? A. I believe his exact words were, "Serve a subpoena upon that man."

307 Q. He did not say, "Serve him with that subpoena," which you had already prepared and waiting for him? A. No, he did not say that.

Q. He said, "Serve him with a subpoena"? What did you say? A. He said, "Serve that man with a subpoena."

Q. What did you do? A. I picked up a subpoena—

Q. Reached right out with the subpoena you had waiting for him? A. I reached down and got it and walked around and served him.

Q. You already described how you handed it to him. He folded his arms and you laid it on his arms; is that correct? A. That is right, sir.

Q. And then you turned and walked away? A. That is right.

Q. You have told us everything that happened at that particular, precise moment when you lay the subpoena on his arms? A. Well, regarding my service of the subpoena.

Q. Regarding any conversation or any actions between you and Mr. Dennis? A. I had no conversation with Mr. Dennis after the subpoena was served.

308 Q. And you made no action or gesture toward him beyond that which you have described to the jury in

simply laying the subpoena on his folded arms? A. That is right, sir.

Q. Now, then, you described how you went back and you wrote on the pink slip, which is designated as a copy. Then you wrote on the back a description in the ordinary fashion as to what you had done? A. A return, yes, sir.

Q. Yes, sir; that is a return.

I direct your attention to the correction on the copy in which for the name Louis J. Russell is substituted the name Robert E. Stripling and ask you in whose handwriting that is. A. That is in my handwriting.

Q. In other words, at the time that you handed the original to Mr. Dennis and put it on Mr. Dennis' arms, the copy had not yet been corrected? A. No, it had not.

Q. Now, subsequently to that did you have anything to do with preparing for the House of Representatives this Government's Exhibit No. 7, which I will show you? The first part is a certification as to the correctness of the transcript, concerning which there is no doubt (handing documents to the witness). A. I did not prepare this, no, sir.

309 Q. Did you see it before it went to Congress? A. Yes, sir.

Q. Where did you first see it? A. In my office.

Q. Did you read it? A. Yes, sir, I did.

Q. Did you notice anything incorrect about it? A. Not that I recall.

Q. Do you notice anything now that does not conform to the facts? A. I haven't read it that carefully.

Q. Will you read it, please? A. Yes, sir.

The Court: May I look at the exhibits while he is reading it?

The Witness: The only discrepancy, if it is a discrepancy that I see, sir, is the word that says the subpoena was duly served as appears by the return thereon made by Robert E. Stripling, chief investigator. The return was made on the copy and not on the subpoena that was served.

By Mr. McCabe:

Q. And after the examination by you, there was presented to the Congress of the United States what purported to be— this exhibit says, after describing the service of the subpoena, it says: The subpoena being set forth in 310 words and figures as follows, as appears on line 8 and 9 on the second page thereof, the words attest, John Andrews, Clerk, and then over your signature appears the word: Said subpoena was duly served as appears by the return made thereon by Robert E. Stripling, and so forth? Now, you made a return on this pink document, which is a copy, and which is marked number 10; is that correct? A. That is correct.

Q. So that the document on which you made the return did not bear the attestation of John Andrews, Clerk, did it?

A. It did not.

Q. It doesn't appear on it now? A. No, it doesn't.

Q. Now, Mr. Stripling, a number of other witnesses appeared before the committee on that day, or was there only one other witness? A. I believe there were three others.

Q. Did you prepare in advance subpoenas for those witnesses? A. No, sir.

Mr. McCabe: I guess that is all.

Redirect Examination

By Mr. Fihelly:

Q. Just one question. May I have the original subpoena?

311 I show you Government 9, the white subpoena, and ask you what was the occasion for Robert E. Stripling being put on there in ink? How did it happen the name Robert E. Stripling was put on in ink and Russell's name scratched out? A. The chairman instructed me to serve the subpoena on Eugene Dennis. I instructed Mr. Russell, who is my assistant, and I was conducting the hearing at the time while Mr. Schmidt was on the witness stand, to go

and prepare a subpoena for Mr. Eugene Dennis, giving the date when he was to appear.

Mr. Russell in preparing the subpoena put his name in as the person who served it. When he brought the subpoena back to me and I noticed that he had inserted his name, I stated to him that I had been directed by the chairman to serve the subpoena.

Mr. McCabe: I think that is objectionable, but I think it is obvious there is nothing sinister about that. Mr. Strippling, go ahead.

Mr. Fihelly: I am trying to clear it up.

The Witness: And Mr. Russell crossed out Louis J. Russell and wrote in my name.

Mr. Fihelly: I have no further questions.

Recross Examination

By Mr. McCabe:

Q. That was done after it had been signed and had
312 the seal affixed to it? A. That is right, sir.

Q. That is correct, isn't it? A. Yes.

Q. You say you were conducting the hearing? A. When I said I was conducting the hearing, sir, I was the examiner.

Q. You were not elected by the people of the United States to conduct hearings, were you? A. I was appointed by the committee which was elected by the people.

Mr. McCabe: That is all.

Mr. Fihelly: That is all.

• • • • •
Edward Kenneth Nellor was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Fihelly:

Q. Mr. Nellor, state your name for the record, sir. A. Edward Kenneth Nellor.

Q. What is your occupation? A. I am a newspaper reporter.

313 Q. For what paper and where are you located? A. New York Sun; I am the Washington correspondent.

Q. Were you present at a hearing of the Committee on Un-American Activities at its chambers in Washington, D. C., on March 26 of this year? A. I was.

Q. Did you see the defendant, Eugene Dennis, there? A. I did.

Q. Would you point out Eugene Dennis? A. That is him there (indicating).

Mr. Fihelly: Let the record show that Mr. Dennis is the designated one, if Your Honor please.

The Court: It may.

By Mr. Fihelly:

Q. I show you Government Exhibit 9 and ask you if you have ever seen that before, sir (handing a paper writing to the witness)? A. Yes, sir, I have.

Q. Will you tell His Honor and the members of the jury just where and when it was that you first saw it? A. I first saw it on March 26 at the hearing on Un-American Activities when Mr. Stripling placed it in Mr. Dennis' hands at the hearing, and I saw it again after Mr. Dennis had tossed it on a table.

Mr. McCabe: I object to that as a conclusion, the
314 word "tossed."

The Court: Tossed?

Mr. McCabe: Yes.

The Court: The objection is overruled.

Mr. McCabe: I am willing to have the witness physically demonstrate it, but that is a conclusion.

Mr. Fihelly: I was going to ask that next.

By Mr. Fihelly:

Q. Demonstrate what Mr. Dennis did. A. He placed it like this (indicating).

Mr. McCabe: Do that again.

(Thereupon the witness complied with the request.)

By Mr. McCabe:

Q. In other words, which of these demonstrations was correct, as you recall? A. They were both meant to be in the same fashion, like this (indicating).

Mr. McCabe: It is for the jury to decide; but in my perhaps dull way I noticed a distinct difference in the two demonstrations.

The Witness: I didn't intend that there should be. It is like this (indicating).

By Mr. Fihelly:

Q. At the time that Mr. Stripling served the sub-
315 poena on Mr. Dennis, where were you? A. I was directly to the right of Mr. Dennis.

Q. Was it directly to the right or to the right rear? A. I beg your pardon?

Q. Was it directly to the right or to the right rear? A. The right rear.

Q. Now, at or about the time the subpoena was served, did you hear the defendant say anything? A. Yes. He said: I hold this committee in contempt.

Q. After the subpoena was tossed on the table, as you used the term, what did you do in connection with the subpoena? A. I went over and picked it up because I wanted to get the data from the subpoena, which I did do.

Q. Were there other newspaper men there who also joined you at the time? A. Yes, sir, they did, and asked where the subpoena was, and I laid it on the table after I had taken the information, and they took the information from it.

Q. Where was the subpoena when you last saw it? A. On the table.

Q. Were you there when Mr. Dennis came into the committee room on that day, March 26? A. When he entered?

Q. Yes, sir. A. Yes, sir.

Q. Was he accompanied by anyone, if you know?
316 Mr. McCabe: I object to that as irrelevant.

The Court: What is the relevancy?

Mr. Fihelly: It is as stated in the opening remarks to the jury.

Mr. McCabe: This should be at the bar.

(Counsel for both sides approached the bench and the following occurred:)

Mr. Fihelly: As I mentioned in the opening statement, and this is one of the significant facts, that Mr. Gates, whom we expect to show was a member of the Communist Party, went into the committee room with him, and at the time Mr. Stripling served the subpoena, he was right next to him, and he said in a loud voice so it could be heard by anyone in the room: Mr. Dennis accepts no subpoenas from anyone. There was no denial or contradiction of that by the defendant, who was standing beside him.

I say that is proper evidence.

Mr. McCabe: If this were a conspiracy charge, it might be evidential, but certainly the old verse: Lord, deliver us from our friends, is applicable.

This defendant is answering for something he did, not what a friend did or what his friend said that he would do. He is not bound under those circumstances by an expression from over-zealous friend while he was there.

Mr. Fihelly: And we have this: Immediately after-
317 ward Mr. Dennis follows up the very statement of Gates and does not accept it, and he throws it down and does not come back, and he said, too: I hold the committee in contempt.

Mr. McCabe: That is his statement. I make no objection to that.

The Court: The objection is sustained.

(Counsel resumed their places at the trial table and the following occurred:)

The Court: Resume the stand, Mr. Nellor.

By Mr. Fihelly:

Q. With respect to the white subpoena, which has been shown you, was anything said by Mr. Stripling to Mr.

Thomas in connection with the serving of that subpoena? A. Mr. Stripling said as he placed the subpoena in Mr. Dennis' hands: Mr. Chairman, let the record show that he has been served.

Q. What did Mr. Thomas say? A. Mr. Thomas said: The record will show he has been served.

Mr. Fihelly: You may cross examine. That is all.

Cross Examination

By Mr. McCabe:

Q. That was during the session of the committee? A. Yes, sir.

318 Q. What happened immediately thereafter? Did the committee adjourn? A. Mr. Dennis was escorted from the room, or left ~~the~~ room, and the committee stayed in session.

Q. Then a press conference was held? A. Yes; at a hotel.

Q. You say Mr. Dennis was escorted from the room? A. Left the room. The guards came up when the disturbance started.

Q. The gendarmes? A. He wasn't forced. He walked out.

Q. You testified, Mr. Nellor, that Mr. Stripling came over and placed this in Mr. Dennis' hands. Now, will you sort of demonstrate with me? Say I am Mr. Dennis for the moment and you are Mr. Stripling. Will you show us what he did?

Before you do that, may I ask you whether or not Mr. Stripling had anything in his hand besides Government Exhibit 9, which is the white subpoena, and I direct your attention particularly to this pink Government Exhibit 10, which is a copy of it.

First of all, did Mr. Stripling have anything beside Government No. 9 in his hand? A. No, sir, he didn't.

Q. He didn't have a pink slip? A. No.

Q. No question about that in your mind? A. No.

319 Q. Do you think it would have been possible for

him to have these papers together without your having seen it? A. No, sir, I don't.

Q. You were standing right there? A. Yes, sir.

Q. You are a newspaper reporter, and it was your job to see what went on? A. Yes, sir.

Q. Now, you are Mr. Stripling and I am Mr. Dennis. What do you want to show me? A. Mr. Dennis had his hands out, like this (indicating), and he placed it like this (indicating).

Mr. McCabe: Now, I ask the stenographer to note that Mr. Nellor, the witness, has directed me, representing Mr. Dennis, to hold my hands outstretched from my body, and my elbows are against my body.

Is that correct, Mr. Nellor?

The Witness: I didn't notice that much detail.

By Mr. McCabe:

Q. But both hands were extended from the body, palms upward. A. Yes.

Q. And the subpoena was left here, that way? A. 320 His hands might have been, I don't want to say if they were palms up. They were out, like.

Mr. Stripling brought it over and handed it to him, and he made a move to take it.

Q. Before Mr. Stripling came over, how were his hands? A. He had one hand behind in this fashion (indicating).

Q. In other words, just with his right hand? We are not pinning you down to an exact recollection. You are trying to describe your recollection, and it is that he had one hand opened out and the other hand was attached to his body, but it was there? A. Yes.

Q. As Mr. Stripling came over, what did Mr. Dennis do? A. When Mr. Stripling came over Mr. Dennis recognized that there was something Mr. Stripling was looking at, and he just sort of stretched his hand out for him.

Q. And Mr. Dennis put his hands out in approximately the position here that you have demonstrated? A. Yes. At the time he had one other piece of paper in his hand.

Q. Mr. Dennis did? A. In the other hand.

Q. What did he do with it? A. I think he put that out with the hand in which Mr. Stripling placed the subpoena.

Q. There is no question that is your recollection,
321 and it fairly demonstrates the manner which you saw at the time? A. As close as that position can be recalled.

Q. After that you say Mr. Dennis—you used the word “tossed”—we are not going to argue about that, and I might use a different word, and you demonstrated that he put the subpoena there on the table like this and he withdrew his hands? A. Yes, and the paper fell on the table.

Q. There is no question about that? A. Not in mind.

Q. It wasn't thrown on the floor or crumpled up and thrown away? A. No.

Q. And you examined it? A. Yes, sir.

Q. Now, let me ask you whether that subpoena, that subpoena with the exception of Government's Exhibit No. 9 written up there, is in the same condition it was in when you saw it? A. No. It is folded and it appeared at the time to be a clean piece of paper.

Q. I direct your attention to the name written in ink up there. Do you have any recollection of having observed that at the time? A. I do, and I recall asking either Mr.

Russell or Mr. Stripling if it had any significance,
322 and they both said “No.”

By the Court:

Q. What was that? A. Mr. Russell scratched out and Mr. Stripling was in pen over it.

Q. That was on there when you saw it? A. Yes, sir, it was.

Mr. McCabe: That is all.

(Thereupon the witness left the stand.)

Mr. Fihelly: Call Congressman Mundt.

The Court: We will take a five-minute recess now.

(Thereupon a short recess was had.)

Mr. Fihelly: Before calling the next witness, I would like to have the stenographic report of March '26 marked with the next Government number for identification, Government No. 13.

(The document referred to was marked Government Exhibit 13 for identification.)

The Court: This is the stenographic report of March 26?

Mr. Fihelly: Yes, Your Honor.

The Court: Is that identical?

Mr. Fihelly: I am not going to offer it in evidence. I was going to show it is available. I am not going to offer it for the reason taken up at the bench, but I did want
323 counsel to know it is available if needed.

Call Congressman Mundt.

Thereupon—**Karl E. Mundt** was called as a witness and, being first duly sworn, was examined and testified as follows:

Mr. McCabe: If Your Honor please, before this witness testifies, may we come to the bench?

The Court: Yes.

(Counsel for both sides approached the bench and the following occurred:)

Mr. McCabe: This is for my own protection in case some other lawyer is looking over the record. I didn't intend to do anything about it.

I believe it was brought to Mr. Fihelly's attention that during the testimony of at least one witness that Mr. Mundt, who apparently is unfamiliar with court procedure, walked into the courtroom.

Mr. Fihelly: We sent for him to be here at 10:30.

Mr. McCabe: And during the recess he was in the witness room and he waited until he was called, and talked with Mr. Stripling and Mr. Nellor, and the other witnesses.

Now, I am assured by Mr. Fihelly that the testimony that Mr. Mundt was to give will not be related to March

26, concerning which Mr. Stripling and Mr. Nellor testified, but will be restricted to April 9. Therefore, it is a simple inadvertence which is not harmful to the defendant, and I wish put on record that I have no objection. I make no comment except for the showing that I thought I should do it in case some other attorney reads the record. No harm has been done to the defendant.

(Counsel resumed their places at the trial table and the following occurred:)

Direct Examination

By Mr. Fihelly:

Q. Congressman Mundt, will you please state your full name for the record? A. Karl E. Mundt.

Q. You are a Representative from the State of South Dakota, sir? A. The First District of South Dakota.

Q. How long have you been a Representative from that State? A. I am serving my fifth term—nine years.

Q. You are also a member of the Committee on Un-American Activities of the House of Representatives? A. I am.

Q. Did you preside at the meeting held on April 9th of this year of that committee at its chambers in this city? A. I did.

325 Q. Who was the next ranking member of the committee, next to Mr. Thomas? A. I was.

Q. At whose direction did you preside at that particular meeting? A. At the direction of Mr. Thomas, coming through Mr. Stripling. Mr. Thomas was out of town.

Q. Was there a quorum present at that particular meeting? A. There was.

Q. What transpired?

The Court: What was your last answer?

The Witness: There was.

Mr. McCabe: I think that is a conclusion. I think the witness may be asked how many were present.

By Mr. Fihelly:

Q. How many were present? A. Seven.

Q. Seven members were present? A. There are nine on the committee and seven were there.

Mr. McCabe: It is agreed that was a quorum.

By Mr. Fihelly:

Q. What took place? First of all, was the meeting called to order by you, sir? A. It was.

326 Q. After the meeting was called to order, what took place in connection with calling the first witness? A. I announced that Mr. Eugene Dennis was the first witness and inquired whether he was in the room.

Q. Was there any response to that or was Mr. Dennis there? A. He was not.

Q. Did Mr. Stripling make any inquiry as to whether he was there? A. I think he also asked whether he was in the room.

The Court: Keep your voice up.

The Witness: I think he also asked whether he was in the room.

By Mr. Fihelly:

Q. Did Mr. Eugene Dennis present himself at all at that meeting? A. He did not.

Q. Has he ever presented himself before the Committee on Un-American Activities?

Mr. McCabe: I object to that. The indictment charges him with wilful failure to appear on April 9.

The Court: The objection is sustained.

Mr. Fihelly: Your witness.

Cross Examination

By Mr. McCabe:

327 Q. Did you receive any communication from Mr. Dennis on the morning of April 9, 1947? A. Did I receive any?

Q. Yes. A. I have never received any.

Q. Was any communication handed up? A. I learned after the meeting that a letter had been——

The Court (interposing): Do not get into hearsay.

The question was whether any communication was handed up.

The Witness: At the meeting of the committee?

The witness: I assume he means the committee meeting.

Is that correct?

Mr. McCabe: Yes.

The Witness: A letter or statement?

By Mr. McCabe:

Q. Either one. A. A man by the name of Lapidus. I think he stood up at the back of the room and said he wanted to read a statement.

Q. Did he identify himself as an attorney? A. As an attorney and secretary of the Communist Party.

Q. What did he say? A. What his statement was?

Q. What did Mr. Lapidus say? A. He said that Mr. Dennis wasn't going to be at the meeting; that Mr. Dennis had asked him to appear in his place.

Q. And did Mr. Lapidus do anything or present anything or attempt to present anything at that time? A. He stood up near the rear of the room and walked to the front of the room with a statement, a piece of paper in his hand.

Mr. McCabe: May we have the defendant's exhibits which have been marked?

Mr. Fihelly: Number 1 is the one you are looking for, Mr. McCabe.

By Mr. McCabe:

Q. Now, Mr. Mundt, I show you what has been marked Defendant's Exhibit No. 1 for identification and ask you if you recognize that document (handing a paper writing to the witness)? A. The statement started out in the salutation——

Mr. Fihelly (interposing): We don't want the contents of the statement.

Do you recognize it or not, sir?

The Witness: It looks to me as if that is the one Mr. Lapidus brought with him that morning.

The Court: What is that?

The Witness: It looks like the one Mr. Lapidus brought with him that morning.

The Court: Brought with him that morning?

The Witness: Yes.

By Mr. McCabe:

329 Q. What did Mr. Lapidus do with it? A. He tried to read it to the committee, and we mentioned that we wanted Mr. Eugene Dennis to testify and not Mr. Lapidus, and then the colloquy took place endeavoring to identify Mr. Lapidus, who was identifying himself.

Q. You didn't have any difficulty identifying him, did you? A. He said that he was the secretary to the Communist Party, that he was attorney to Mr. Eugene Dennis, and that he lived in New York City. He was quite clear cut in his identification.

Q. Did he ask leave to read this statement? A. That is right.

Q. And that leave was denied? A. We told him to leave it with the committee.

Q. Did you see what he did and the committee did with it? A. I didn't.

Q. Did you make any suggestion what the committee would do with it? A. Yes. I suggested that the committee would read it, which eventually they did do.

Q. Did you say that you thought the committee should consider this statement in executive session, and then determine whether or not it is a valid reason for not answering the subpoena and governing your actions accordingly? A. I think those are my words.

330 Q. In other words, you simply wanted to look the statement over and see what it said to determine whether it was a valid excuse for his not appearing? A. Yes.

Q. Did you read it over? A. Yes, sir, I did.

Q. And then later the committee determined to refer this matter to the House of Representatives; is that correct? A. That is correct.

Q. You sat on the committee when it determined that? A. That is correct.

Q. And did you refer this letter to the House of Representatives? A. I am not sure whether that letter was included in the report given to the House of Representatives or not.

Q. Aren't you sure it wasn't given, Congressman Mundt? A. No, I am not.

Q. Have you read a record of the proceedings? A. That is right.

Q. I will ask you now to refer to Government Exhibit No. 7, which is by its terms proceedings against Eugene Dennis, also known as Francis Waldron and presented on April 10, which is a report to cite Eugene Dennis for 331 contempt, and ask you if you find any reference in that exhibit to this letter which you have stated you considered in executive session, or this statement? A. No, sir, I do not.

Q. Did you know that it is part of the requirements, after requesting that the House refer for action a citation for contempt, that you refer the facts concerning the alleged default? A. I know that these facts were presented during the course of the House debate when that was considered.

Q. And you also know that Dennis' explanation of why he did not appear was not presented to the House for them to determine whether or not it was a valid excuse, didn't you? A. No, sir; it was presented to the House.

Q. This statement was presented to the House? A. It was presented to the House during the course of the debate at which time the House made up its decision on the citation for contempt.

Q. Were you present at that time? A. When the debate took place; yes, sir.

Q. Now, Mr. Mundt, I show you a copy of the Congressional Record of the hearings on Tuesday, April 22, and direct your attention to page 3929, proceedings against Eugene Dennis, also known as Francis Waldron, and I believe those proceedings—I am trying to see how far they go—and I believe they extend to 3936, which appears 332 to be the vote on it.

I will ask you to look through that and see whether you find that statement entered as part of the record for consideration by the Congress of the United States (handing a document to the witness)?

The Witness: Your Honor, may I put in the record—

Mr. Fihelly (interposing): No, we don't want any discussion. He asked whether the statement is there verbatim.

The Court: Answer the question "Yes" or "No."

The Witness: I don't think I can answer the question "Yes" or "No."

I would like to quote part of my statement.

Mr. Fihelly: We don't want any statement.

The Court: The witness stated the statement identified in this case, Defendant's Exhibit No. 1 for identification, was considered by Congress at the time of the debate on the contempt resolution.

Now, the Congressional Record has been shown to you, and I assume for the purpose of refreshing your recollection on that.

Now, I assume that Mr. McCabe, the attorney for the defendant wants to find out whether or not with your recollection refreshed, your answer is the same.

Isn't that correct, Mr. McCabe?

Mr. McCabe: That is correct. I think I know the 333 difficulty in which the witness finds himself, Your Honor, and I was thinking about asking him another question. I think we can resolve that.

The Court: Very well.

Mr. McCabe: I think it is unfair to the witness to leave him in that position. I think the witness is referring to a

reference to the first paragraph of the letter, which appears on page 3930 of the record, and my question originally was and still is whether this statement was considered by the Congress.

In order to solve the dilemma of procedure, and as long as the witness is under cross examination, I will ask leave to interpolate the question:

By Mr. McCabe:

Q. Is it a fact, Mr. Mundt, that page 3930 of the Congressional Record of April 22, 1947, the third column, during the statement being made to the House, you described the issuance of the subpoena for Mr. Dennis, and then you said: He refused to answer it; he asked an attorney to represent him at the appointed time, after having accepted service of the subpoena, and I will read the first sentence of his attorney's statement, and then you read: This is to inform you that I shall not attend the meeting of your committee April 9th? A. That is correct.

334 Q. That is correct? A. That is the statement to which I was referring.

Mr. McCabe: That explains the witness' difficulty.

By Mr. McCabe:

Q. Now, Mr. Mundt—

The Court (interposing): Have you finished the answer, Mr. Mundt?

The Witness: Yes, sir.

By Mr. McCabe:

Q. Now, Mr. Mundt, does this report correctly reflect what went on in so far as it indicates that that was the only portion of the statement of Mr. Dennis' which was presented to the Congress of the United States in support of this motion for a citation? A. That is correct.

Q. I shall ask you to count it. I will ask you what is the page number on this (handing a paper writing to the witness)? A. Page 11.

Q. So that unless there is some error in computation, it is an eleven-page statement, and the first sentence was offered to Congress? A. May I say why when the first statement was read?

Q. Not under my examination.

There is no question the rest of it was not read to Congress? A. No question.

Q. Mr. Mundt, during the session of April 9th, after it became evident to you, as acting chairman, that Mr. Dennis was not in the hearing room, did you then make a statement to Mr. Stripling, which you stated to Mr. Stripling: You may proceed with the case against Mr. Dennis in absentia? A. That is correct.

Q. That was a case against Mr. Dennis? Those were the words used? A. I used those words.

Mr. McCabe: That is all.

Redirect Examination

By Mr. Fihelly:

Q. Why did you only state the first sentence of Defendant's Exhibit No. 1 to the House of Representatives in connection with the citation and report?

Mr. McCabe: Now, on the present state of the record I object to testimony as to the reasons which went into Mr. Mundt's or the committee's failure or decision not to present the entire letter to Congress. I think the fact is evidential. I think unless the statement is in evidence in its entirety that Mr. Mundt is not entitled to explain why he did not present it in its entirety. Therefore, I object to the question unless it is agreed the statement go in evidence.

The Court: All right. I pass on objections to questions.

Mr. McCabe: I object to the question.

The Court: I sustain the objection.

Mr. Fihelly: I have no further questions. That is all, Mr. Mundt.

The Court: You cannot go into that.

(The witness left the stand.)

Mr. Fihelly: May Mr. Mundt be excused subject to phone call?

The Court: Yes.

Mr. Fihelly: The Government rests.

Mr. McCabe: Now, I have certain matters which I think I might more properly develop in the absence of the jury.

The Court: Yes. The jury will leave the room during the consideration of these legal matters and remain outside until called back.

(The jury left the courtroom at 11:40 a. m.)

Mr. McCabe: Do we have the exhibits here, Mr. Fihelly?

Mr. Fihelly: Yes.

The Court: Here are some of them.

Mr. McCabe: Your Honor, I first move to strike from the record all the testimony of the witnesses Thomas and Stripling, just the witnesses Thomas and Stripling relating to the alleged service of the subpoena on the defendant, Eugene Dennis.

At the same time I move to eliminate from the record Government Exhibit No. 9 and 10, which comprise the original and copy of the alleged subpoena.

My reasons for making that motion are threefold. The first reason is that the Government's testimony has shown that the subpoena is illegal, a subpoena which was signed in blank by the chairman of the committee. It was a subpoena which when signed by him and having affixed to it the seal of Congress was a mere nullity, was a blank subpoena directed to no one, in so far as the body of the subpoena was directed.

It was directed to Mr. Russell, and he was commanded to summon blank before a blank committee, of which the honorable blank was chairman, at their chambers in Washington on a blank day, and at a blank hour.

Now, Mr. Thomas testified that had been made out and signed by him some time before, and I submit if the time ever comes when blank subpoenas can be used to drag

people from their places of business that we are returning to the times of the old Writs of Assistance against which Steven Otis raised his voice so eloquently many years ago in what has been declared to be the revolution in America. Blank subpoenas are not part of our legal procedure. In certain cases there may be no objection to it under a subpoena to appear and testify before a committee of Congress, where a man is not protected often from 338 questions which might degrade or make inferences.

But as far as blank subpoenas in the hands of investigators which subject a man to imprisonment for failure to obey the subpoena is simply a reversion to old practices and not the practices that have been known for years. That is my first objection.

The second objection is just as serious, that is, as to the time and place of service. The Government has proven from its own witnesses on direct examination that the service was made upon this defendant at a time when he was a witness before that very committee. Now, it is a part of our law, in order that our courts of law, in order that litigants may have the full benefit of calling witnesses in their behalf, in order that committees may have the benefit of testimony of persons without fear of harassment, witnesses are protected from the service of subpoenas during the time they are appearing before a congressional committee.

On that there is an old case in the District of Columbia back in 1874, which has never been whittled down in the slightest degree. That is the case of Wilder vs. Welsh, which is found in 1 MacArthur 566, or 8 District of Columbia 566. Now, that was a motion to set aside the service of a summons on the ground that the defendant in the suit, when the service was made upon him, was a witness 339 from one of the States in attendance upon a congressional committee under subpoena, and it was claimed that he was exempt from this process while in attendance, and in coming and returning from the city.

The court unanimously held that the privilege of a wit-

ness before Congress, or before any of its committees, stands on the same footing as the privilege of the members of that body, and this does not extend to freedom from the service of a simple, ordinary summons, but only from arrest.

As no privileges, they said, had been violated in that case, they threw it out.

That case was commented upon, briefly, and the law upheld in the case of Long vs.—I don't know whether it is A-s-w-e-l. It is Long vs. Ansell. I could not make it out. It is written in someone else's writing. It is 55 Supreme Court 21.

The Court: No, no. It is in our Court of Appeals.

Mr. McCabe: Maybe that is.

The Court: It was a case against Senator Long, wasn't it?

Mr. McCabe: I am reading someone else's law on that point. It is in 293 U. S. page 76.

Now, Jefferson's Manual, United States Government Printing Office in 1945, in Section 3 has this to say: This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person, as a subpoena ad respondendum or testificandum.

340 The Court: That was a suit for libel brought by General Ansell against Senator Long, for alleged libel on the Senate Floor.

Mr. Freedman: This case referred to the original case, that the rule laid down as to immunity of litigants members of Congress is the same.

Mr. McCabe: Then I quote Rapalge on the privilege of witnesses, page 529: "But the privilege of a witness attending before Congress or any of its committees, does not extend to freedom from the service of a simple summons, but only from arrest."

Now, here we have had some talk on the desirability of Congress and the committees in their desire to seek enlightenment for the purpose of legislation. They are en-

titled to seek facts, but Mr. Thomas said with regard to Dennis, why, of course, legislation regarding the Communist Party was obvious and we wanted the secretary of the party there.

Now, that privilege and that right of a committee of Congress entitles them to have a man come before them without fear of harassment, without fear of being subjected to service of a subpoena, and I am not referring to him, but I have a right to refer at this time to what I think was the lack of good faith of the committee in having the committee already to slap a subpoena at him, regardless of the fact they had no right to serve a subpoena on him at that time, and the service of the subpoena is void as to subjecting
341— him later to attachment or conviction for contempt.

Now my third reason in support of my motion to strike out the testimony relating to service, and I am basing this same argument, whether the motion is sustained or denied, the same argument will be used in the motion for a directed verdict of acquittal. I won't burden Your Honor with the repetition of it, but there is a third reason why service was void, in so far as that service would render the defendant liable to attachment and liable to conviction, and that is this: At the time service was made there was no tender of a witness fee or mileage. I think it is certainly in book law. There aren't too many cases on it, but I have a case in re Boeshore, which was decided in 1903 and reported in 1925 Federal Reporter at 651, in which a man was subpoenaed to testify as a witness in a proceeding pending before the Patent Office, and the court referred to Section 4908 of the Revised Statutes and said: "No witness shall be deemed guilty of contempt for disobeying such subpoena when his fees and traveling expenses in going to and returning from, and one day's attendance at the place of examination, are paid or tendered him at the time of the service of the subpoena." The court referred to the fact that the mere fact that the defendant, that the person served, did not demand the witness fee could in no way be considered a waiver. Where it is the desire to attach

342 the man for contempt, you have to tender his witness fees and mileage.

In 70 Corpus Juris, page 55, under the title "Witnesses" the court said:

"In civil actions and proceedings, although not, it has been held in criminal cases, nor in proceedings by the State to enjoin the maintenance of a nuisance, it is necessary under the common law, which in a number of jurisdictions has been declared or confirmed by a statute, that, at the time of the service of a subpoena, the fees to which the witness is entitled for travel to and from the place at which he is commanded to appear, and for one day's attendance there, be paid or tendered him." And they cite the Boeshore case.

Then they go on to section 44 in that same citation in Corpus Juris, and they say: "A witness who fails to appear in obedience to a subpoena may be punished as for a contempt unless the witness was entitled to be paid or tendered his fees and expenses at the time of service and such payment or tender was not made."

In this case no such tender was made, and I cross examined the witnesses whether they had described everything they did. I went into that with particularity with Mr. Stripling, and Mr. Stripling gave his explanation of it and said nothing else occurred. He said: I went over and

I handed the subpoena, and I turned my back and
343 walked away.

Under those circumstances the Government has not made out a case of the issuance of a valid subpoena, or that the service was valid for the subpoena or was in compliance with the cases relating to the service of a valid subpoena.

I move also to strike from the record Government Exhibit No. 7 on the ground that what purports to be a copy of the subpoena served has been shown by Government witnesses not to be a correct copy, and I am referring now to the absence of the attestation.

The Court: Can you get me—does this statute appear in the United States Code?

Mr. Fihelly: 2-192.

Mr. McCabe: I have the statute here.

Mr. Fihelly: The first point commented on by counsel was in connection with what he calls subpoenas in blank. There was no subpoena in blank issued in this case. There was, as Mr. Thomas testified, and there had to be due to the exigencies of the situation, a few, probably six subpoenas that were kept for emergency purposes where, if he were out of town, Mr. Stripling or one of his investigators needed one, they could call him and say, "We want to issue a subpoena, if necessary," and the authority would be given to fill it in. One of the subpoenas, under the direction of Mr. Thomas, was filled out and he served it on Mr. Dennis. It was filled in under the direction of Mr. Stripling,
344 and Mr. Russell brought it back to him and he struck out Mr. Russell's name and put in his own. It was the original, of course, that was served, and not the copy.

With reference to the second point, he said it was improper to serve the defendant Dennis because he was a witness. All of the evidence in this case shows that the defendant Dennis was not a witness. He was refusing to testify. He would give no testimony, and even before the subpoena was served on him, he said, "I hold the committee in contempt," and certainly under the wildest stretch of the imagination you couldn't call that testimony, "My hair is brown, my eyes are blue," you couldn't call that testimony. Certainly a committee has a right to subpoena someone before it just as a grand jury has a right to subpoena someone before it. This is a service of civil process on an individual. It is not arresting him for something he may have done, but it is an orderly procedure in a committee taking testimony, and when a man refuses to testify they have the authority to order, to instruct that a subpoena of that committee, bearing the seal of the House of Representatives, that this seal be placed on it, and that was done, and done prior to the hearing.

Now, counsel says no mileage was offered with the subpoena when the subpoena was served on him. Of course, it is interesting to read his statement. He did not make any complaint about mileage and, furthermore, the
 345 subpoena was served on him in the city of Washington where no mileage was necessary. If it was done in New York the mileage might apply, but it was served right here in Washington and there was no mileage necessary, or no subsistence necessary.

The only other point made was with reference to the copy. Counsel wanted to strike the copy because it was not an exact duplication of the original, did not bear the name of the clerk. The original was signed and bore the name of Andrews as clerk. Furthermore, if Your Honor will read 601, I think it is, which was the original act, picked up in 1947, the original act under which the committee was brought into existence in 1946, and in January, 1947, they merely renewed it, says the summons may be signed by the chairman of the committee or a clerk thereof, and nothing is said about the clerk otherwise, and even if that were necessary, that is on the original.

The Court: Have you anything further?

Mr. McCabe: I don't think I have anything to add, Your Honor, to what I have already said.

I might add, Your Honor, to what Mr. Fihelly says about the non-necessity of mileage and sustenance, or witness fees, because he was served here in Washington, it is in the testimony that Mr. Dennis was not a Washingtonian. He was served on the 26th of March with a subpoena requiring him to be here on April 9. I think one of the purposes of mileage and witness fee would be to protect him against
 346 the exigencies of support during that time. I think it is not a mere catching of the man when he happens to be away from his home State and making him come back. They could serve him with a subpoena requiring him to appear in six months, and what is he to do in the meanwhile?

The Court: Let me see the exhibits.

Mr. McCabe: I believe Your Honor is familiar with the Cole-Leese case, in which Leese was served with a subpoena, and went into the Senate and announced he had been served with a subpoena to appear before the grand jury of this District, I believe, and said he intended to ignore it, and the grand jury sought the advice of the Presiding Judge. The Judge said, "I am sorry, the privilege of arrest—the only thing we can do to a man who fails to appear in a case like this is to attach, and the authority is absolute in that case, and we can't do anything about it."

The Court: The motion to strike out the testimony of Thomas and Stripling relating to the alleged service of the subpoena is denied.

The motion to strike also the Government Exhibits 9 and 10 is denied.

The motion to strike out Government Exhibit 7 is denied and exception allowed.

Mr. McCabe: I don't know whether the stenographer got it as Thomas and Stripling.

347 The Court: I thought I said Thomas and Stripling.

Mr. McCabe: At first I thought it sounded like Thomas Stripling.

Mr. Fihelly: You said Thomas and Stripling, Your Honor.

Motion for Acquittal.

Mr. McCabe: Now, if the Court please, the Government having rested, I should like to have leave to make a motion for a directed verdict of acquittal.

The Court: A judgment of acquittal, I think that is what it is under the new rules.

Mr. McCabe: Yes.

The Court: But we have no doubt as to what you mean.

Mr. McCabe: In support of that, in addition to the matters already relied on in connection with my motion to strike out this testimony, and which I suppose I should not

repeat now, I would urge the further points: All of the Government's case shows that this, so far from being contempt which should render one subject to indictment and conviction in the section involved, was simply a natural human effort of the witness to protect himself from the harassment which also was the real purpose of the committee.

The defendant in this case has not been permitted by Government witnesses to present to the body which attempted to subpoena him a full and complete explanation, honest meaning and justification for his failure to appear.

Now, I submit the action of the body in rushing in and procuring an indictment instead of answering his explanation, was to have said to him first, "We have your explanation. We do not think it is a good explanation, and we will say to you now, Mister, that if you do not come forward we are going to proceed against you for contempt." I say that the failure of the committee to do that indicates that their purpose in seeking that indictment was not in conformance with law, or right to sustain their dignity as a committee having the power to subpoena, but was consistent with the allegation made by the defendant in the letter, and their failure to present to the grand jury the matters contained in explanation of his alleged default goes right to the heart of this case, and should protect this defendant against the possibility or conviction for contempt.

I think under all the circumstances here we are warranted in asking the Court to say, "Now, we may question Mr. Dennis, we may question the advice which he received, but we certainly do not believe that his failure to appear was a wilful default, and we could not sustain a conviction, and if we could not sustain a judgment of conviction we will enter a judgment of acquittal."

Mr. Fihelly: If Your Honor please, I do not think the motion needs any reply. We stand on the evidence.

349 The greater bulk of his discussion was directed to

the fact that this scurrilous answer, which Your Honor has ruled on should not go to the jury and, in addition to Your Honor's ruling at the bench, we have the ruling of Mr. Justice Keech who held that that answer was not proper to prosecution.

Mr. McCabe: If Your Honor please, we say the committee, and Mr. Fihelly upholds that, that they show by their own actions and their testimony here, that they did not comply with the statute relative to presenting this matter to Congress. That statute, I think, is 194, the indictment was 192; 194 provides that a person—

The Court: You have read it.

Mr. McCabe: Their own exhibit here, a statement of fact, the statement of such failure; now I say a statement of fact certainly does not mean a pure statement of fact or a personal statement of fact—

The Court: It does not state a statement of law and fact.

Mr. McCabe: Just like what they say.

The Court: It says statement of fact.

Mr. McCabe: Let's look at what they say. The photostatic copy of it is what, 7?

Mr. Fihelly: Seven.

Mr. McCabe: May I see it, Your Honor? They say they are presenting all the facts. Do you have exhibit 5
350 there?

The Court: Yes.

Mr. McCabe: Exhibit 5 is House Regulation 193, dated April 22, 1947.

“Resolved, that the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives, as to the wilful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron, to appear before the subcommittee on Un-American Activities in response to the subpoena served upon him on March 26, 1947, together with all of the fact sin connection therewith, under seal of the House of Representatives to the United States Attorney for the District of Columbia, to the end that the

said Eugene Dennis, also known as Francis Waldron, may be proceeded against in the manner and form provided by law."

Now, the House was certainly under the impression that they had all the facts in connection with this before them. The Government's case shows that they did not have the facts in connection therewith before them, and I say that that in itself is enough to warrant a judgment of acquittal.

The Court: The motion is denied.

Mr. McCabe: Your Honor will grant me an exception?

The Court: Yes.

Mr. McCabe: Now, Your Honor, we are in this position;

I have offered proof, I have attempted to state to
 351 the jury what I intend to prove and, in the interest
 of an orderly trial, although perhaps not in keeping
 with the ordinary procedure that has been considered,
 and I have been told that I could not state to the jury the
 matters which I intend to prove and Your Honor has stated
 of record your reasons why I could not prove them; I think
 Your Honor has said that the matter is irrelevant, therefore
 I certainly do not want to be in the position of being
 stubborn; I think Your Honor was very indulgent with me
 in allowing me to follow the line of questioning which we
 all know would be objected to, and which would be sustained,
 and I do not intend to abuse the indulgence of the Court.

The Court: You didn't.

Mr. McCabe: I know I have gone overboard a little bit,
 and I do not care to attempt to do that again by attempting
 to open to the jury matters that your Honor has ruled
 are inadmissible in this case, and so I would like at this
 time, there again I would like to make a proffer of proof in
 accordance with what is set forth in Defendant's Exhibit
 3, and I would like to know if Your Honor would allow me
 to offer to prove the matters set forth in Defendant's
 Exhibit 3.

Mr. Fihelly: That is the opening statement?

Mr. McCabe: Yes, that is the opening statement.

The Court: I think you should tender the witnesses and state what you expect the particular witness to testify to when you are tendering the proof.

Mr. McCabe: I see what Your Honor has in mind, and I wanted to avoid both the expense and the delay attendant upon a futile serving of my witness when Your Honor has already stated I would not be allowed to prove the matters set forth in my tendered opening to the jury.

The Court: Well, you will have to pursue your own program, Mr. McCabe, with respect to that matter. I do not see how I could consider an opening statement which you wish to make and which I deny you the right to make, as a tender of testimony. You can make it as a tender of testimony if you like and then I will act on your tender and your record is made.

Mr. McCabe: If Your Honor please, I would propose to prove by witnesses, and I do not wish to state or call the names of the defense witnesses because the witness I might propose to call might be unavailable; I would propose to prove all of the matters set forth in Defendant's Exhibit No. 3. Will I be permitted to prove the matters set forth in Defendant's Exhibit 3?

The Court: ~~If~~ you offer the witnesses I will rule on them when the objection is made and you can come to the bench and make your offer of proof in the regular way. I cannot permit an open statement to be accepted as a tender of testimony unless the Government concedes it.

Do you?

353 Mr. Fihelly: No, Your Honor, we do not.

Mr. McCabe: At this time, then, Your Honor, I offer in evidence as Defendant's Exhibit 3—

Mr. Fihelly: That is the proffer of proof?

The Court: Do you object to it?

Mr. Fihelly: Certainly we object to it. We have already, Your Honor.

The Court: Objection sustained.

Mr. McCabe: Your Honor will grant me an exception?

The Court: Yes.

Mr. McCabe: I offer in evidence Defendant's Exhibit No. 4-A. May I ask do we have the other exhibit here?

Mr. Fihelly: Here is another.

Mr. McCabe: All right. 1 — 4 — 5 — 3. Is 2 in the matter—oh, here it is.

Now, if Your Honor please, I offer in evidence Defendant's Exhibit No. 1, which is the letter addressed to J. Parnell Thomas, which was identified by Mr. Thomas.

Mr. Fihelly: That is the same as the one Your Honor ruled on and we object to all of this, they relate to the same substance.

The Court: You object to number 1?

Mr. Fihelly: I object to number 1.

The Court: Objection sustained.

Mr. McCabe: Your Honor grants me an exception?

354 The Court: Yes.

Mr. McCabe: Now, I offer in evidence, and this is only in connection with the motion to discharge the jury because of presence in the court in the Barsky case during arguments, and I have offered in evidence pages—

The Court: Didn't you mention the pages when you referred to it?

Mr. Fihelly: I think you did, Mr. McCabe.

Mr. McCabe: I mentioned it in my original offer when it was marked for identification, and I shall offer those pages in evidence at this time.

Mr. Fihelly: We have no real objection, if Your Honor please. If Your Honor feels it should go in, I leave it to Your Honor's discretion.

The Court: I think it should go in so that my reason for refusing to discharge may be reviewed.

Mr. McCabe: Now, I offer in evidence Defendant's Exhibit 4-A, which consists of the envelope and the letter, 4-A is the envelope and 4-B is the letter, which was mailed to Mr. Thomas and identified by him, and which I believe is identical with—

Mr. Fihelly: Number 1.

Mr. McCabe: Number 1.

Mr. Fihelly: We make the same objection, if Your Honor please.

The Court: Sustained.

355 Mr. Fihelly: And I think in connection with number 1, you refer to it as a letter, but it is more properly a statement given by Mr. Lapidus to the committee.

Mr. McCabe: Your Honor sustains the objection and grants me an exception?

The Court: Yes.

Mr. McCabe: And I offer in evidence Defendant's Exhibit No. 5 which is, as I recall it, the statement handed up at the meeting of April 9th, and is either identical with, or practically identical, with exhibits 4 and 1.

Mr. Fihelly: We make the same objection, your honor.

The Court: The same ruling, and exception allowed.

Mr. McCabe: Now, if Your Honor please, I wonder if Your Honor will indulge me while I consult with my colleagues?

The Court: Yes, this is about the time for the regular recess.

Mr. Marshal, would you inform the jury they will be excused until 1:30?

• • • • •
356 Mr. McCabe: May I reopen to the jury, Your Honor?

The Court: Yes.

Opening Statement on Behalf of Defendant.

Mr. McCabe: Members of the jury, the Government having concluded its case, it now becomes my opportunity to state briefly to you what we intend to prove to show that this defendant should not be convicted of the charges against him.

I propose to prove, first of all, that this Committee on Un-American Activities is not a constitutional committee; that it is not—

Mr. Fihelly: I object. Just a moment. I object to the statement.

The Court: I sustain the objection. Is not that among the matters that I ruled on?

Mr. Fihelly: Certainly, and counsel knows it.

Mr. McCabe: Yes, sir.

The Court: Well, I have ruled, Mr. McCabe.

Mr. McCabe: Well, your Honor, I understood you to say this morning that you would not rule on my right to prove that until I presented a witness. I am telling this jury that I propose to call a witness to prove just that.

357 The Court: But I have limited your opening statement to exclude that. When you call witnesses, you would call them to make a tender of proof at the bench, so that you could preserve your record.

Mr. Fihelly: And, your Honor, if I may just make this statement, I think it is clearly understood between us that this document Defendant's counsel has, which counsel is now hiding behind his back, was excluded as an alleged opening statement, which he now is doing in his statement.

Mr. McCabe: Mr. Fihelly, if there was any hiding of this statement to be done, it was done by Mr. Fihelly, because I am prepared to hand it to the jury.

Mr. Fihelly: I know, but it has no more to do with the case than the flowers that bloom in the spring, and his Honor has so ruled.

Mr. McCabe: Let us not talk about hiding. We have gotten along pretty well so far.

Mr. Fihelly: Let us not cut corners, then.

Mr. McCabe: I further propose to prove, members of the jury, that the purpose of the committee in subpoenaing this defendant and other persons before them was not for the purposes for which that committee was created—

Mr. Fihelly: If your Honor please, I object to that statement.

The Court: Sustained.

Mr. McCabe: Will your Honor grant me an exception?

358 The Court: Yes.

Mr. McCabe: May I repeat, then, your Honor, that I propose to open to the jury and read to them as matters which I intend to prove the paragraphs set forth in Defendant's Exhibit No. 3?

The Court: Yes.

Mr. McCabe: I understand your Honor prohibits me from doing that?

The Court: That is right.

Mr. McCabe: Call Congressman Marcantonio, please.

Evidence on Behalf of Defendant.

Thereupon, **Vito Marcantonio** was called as a witness and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McCabe:

Q. Your full name, Congressman? A. Vito Marcantonio.

Q. What is your residence? A. 231 East 116th Street, New York City.

Q. And your profession or position that you occupy? A. I am an attorney at law by vocation and a Member of Congress, as well.

Q. Have you been a Member of Congress for some 359 terms? A. This is my sixth term.

Q. From what district are you elected to Congress? A. The Eighteenth Congressional District, New York.

Q. Will you state the boundaries of that district? A. Roughly, its southern boundary is Fifty-Ninth Street, its northern boundary is One Hundred Twenty-Seventh Street, the eastern boundary is the East River, and the western boundary zigzags along Second Avenue, Third Avenue, Lexington Avenue, Fifth, and back to Third.

Q. How many qualified voters are there in your district? A. I should say about 97,000.

Q. Could you briefly characterize the make-up of the constituents of the qualified voters of your district—

Mr. Fihelly: I do not think—

Mr. McCabe: Let me finish the question.

Mr. Fihelly: All right, sir.

By Mr. McCabe:

Q. (Continued) as to social position, occupation, racial origin?

Mr. Fihelly: That is all, sir?

Mr. McCabe: Yes.

Mr. Fihelly: I object to the question.

The Court: What is the relevancy of it?

Mr. Fihelly: There is no relevancy whatsoever.

Mr. McCabe: I think it would have relevancy in
360 the examination of this witness, your Honor, to show
that because of the make-up of his district he has
paid particular attention to the activities of this Committee
on Un-American Affairs and its predecessor committees,
because of the particular impact upon persons in his district
arising out of their national origins.

The Court: Sustained. Exception granted.

Mr. McCabe: Your Honor grants me an exception.

By Mr. McCabe:

Q. Mr. Marcantonio, have you been familiar with the activities of the present House Committee on Un-American Affairs since it was set up in the present session of Congress? A. Very familiar. I have followed its activities very closely.

Q. Did you follow similarly the activities of its predecessor committees since their inception? A. I did.

Q. Has that Congress ever characterized the constituents who sent you to Congress in any particular manner? A. Yes, they have.

Mr. Fihelly: I object. Just a moment. You are in court. You are a lawyer—

The Court: Mr. Congressman, when there is an objection, you must not answer until I rule on it.

361 Mr. Fihelly: I object to the question and ask that the part of the answer be stricken.

The Court: I did not hear the part, if there was any answer.

I will ask the reporter to come to the bench and read it to me.

(The reporter approached the bench and read the last answer.)

The Court: All the reporter got were the words, "Yes, they have."

I sustain your objection.

Mr. Fihelly: I ask that the answer or a part thereof be stricken, your Honor.

The Court: That will be stricken.

By Mr. McCabe:

Q. Do not answer this, of course, Congressman, until there is an objection. There probably will be:

Are you able to tell us now, and will you tell us if you are able, the characterization which this House Committee applied to the constituents in your district?

Mr. Fihelly: I object, if your Honor please.

The Court: I sustain the objection.

By Mr. McCabe:

Q. You say that you have paid particular attention to the activities of this committee and of its predecessor
362 committees; is that correct? A. That is correct.

Q. Any particular reason why you paid particular attention to their activities?

Mr. Fihelly: I object, if your Honor please.

The Court: Sustained.

Mr. McCabe: Your Honor grants me an exception?

By Mr. McCabe:

Q. Congressman Marcantonio, did this committee ever take any action with regard to any organization of which you are a member?

Mr. Fihelly: I object, if your Honor please.

The Court: I do not see its relevancy, Mr. McCabe.

Mr. McCabe: I think it goes particularly, your Honor, to the point of showing—

The Court: Of what?

Mr. McCabe: Of showing that this committee has not even attempted to act within the scope of the authority under which it was set up. They have gone beyond that scope and engaged in deliberate smear tactics upon individuals and organizations, and I asked this witness whether they ever have acted with regard to an organization of which he is a member.

The Court: I sustain the objection.

Mr. McCabe: Your Honor grants me an exception?

By Mr. McCabe:

363 Q. Are you familiar with any activity which this committee ever took with regard to Paul Bill Robeson?

Mr. Fihelly: I object, if your Honor please.

The Court: Sustained.

Mr. Fihelly: And I suggest, if your Honor please, that this be proffered at the bench, if they are going to be along these lines. Counsel must know that they are objectionable. He stated to your Honor a while ago that the long line of questions that were ruled on he knew were going to be objected to and were going to be sustained.

Mr. McCabe: There is always hope that his Honor will change his mind.

Mr. Fihelly: I know there is. Hope springs eternal in your breast.

The Court: If the succeeding questions are along the lines that I have ruled on, I will ask counsel to come to the bench and make the tender there.

Mr. McCabe: Before coming to the bench, your Honor, rather than come to the bench and argue at side bar, I would like to make the argument in open court, in the presence of the jury.

The Court: Well, that will not be permitted.

Mr. McCabe: Your Honor will grant me an exception?

The argument may be somewhat extended. Would it be proper to suggest that the jury be excused.

364 The Court: I think I have heard your argument on this very point before, Mr. McCabe. If you will come to the bench, if there is anything new; and it seems more convenient for you to be at counsel table, I will be glad to give you that privilege. If it is just repetition of what you have told me, there is no reason to excuse the jury.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: One reason that I believe I am entitled to make this argument in open court is that I think the defendant is entitled to a public hearing, and I think that the matters which I urge, even though your Honor may feel legally are not for the eyes of the jury, are proper to be made in the eyes of the public and of the press.

Mr. Brodsky: And the defendant. He wants to hear it. This case is being tried in his absence, although he is physically present.

The Court: He can come to the bench any time he pleases. What about that?

Mr. Fihelly: No objection, your Honor.

Mr. Brodsky: I think this should be tried in open court.

Mr. McCabe: Your Honor rules that way?

The Court: You do not care to make any further argument at the bench?

Mr. McCabe: Yes, I will, but I say, may I have an
365 exception to your Honor's denial to me of the privilege of making my argument and presenting it in open court, in the absence of the jury, in the hearing of the spectators and of the press, on matters which I hope to prove through this witness?

The Court: What have you to say to that?

Mr. Fihelly: I say if they are along the same line he is making, they should be made at the bench, as your Honor suggested, because you had this situation in the absence of

the jury. Counsel frankly told your Honor that this long line of questioning which had been submitted after objection—and some had been asked in front of the jury—to your Honor at the bench he knew was objectionable and knew they were going to be sustained by your Honor. In view of conduct of that nature, I think that a proffer of this kind should be made at the bench, particularly when two or three questions along this same evident line, applicable to other situations, have been sustained by the Court.

The Court: I will hear any further arguments you care to make at the bench.

Mr. McCabe: Your Honor gives me an exception?

The Court: You do not care to make a further argument?

Mr. McCabe: Oh, yes. I make a proffer of proof. I now have a witness on the stand. By this witness I propose to prove the matters set forth in Defendant's Exhibit 366 No. 3.

(At this point Eugene Dennis, the defendant, approached the bench.)

The Court: Yes; you can come up any time you care to, Mr. Dennis. You are not excluded from these conferences. These conferences are only so that they will be out of the presence of the jury.

Mr. McCabe: I propose to prove now by this witness who has been sworn the matters set forth in my proffer of proof which has been marked Defendant's Exhibit No. 3. I propose to ask him seriatim questions which will bring out answers in proof of each one of these items.

Mr. Fihelly: We object to each and every one of those questions, as we have before, and having objected to the subject matter, which has been sustained by your Honor, we will object to the question being propounded of this witness or any witness.

The Court: Objection sustained.

Mr. McCabe: Your Honor grants me an exception?

The Court: Yes. You have your record.

Mr. Brodsky: One of the things we want to do is qualify him, and I want to know if your Honor thinks we have gone far enough on qualification. I would like to qualify him as an expert.

The Court: Mr. Marcantonio?

Mr. Brodsky: Yes. I want to know if your Honor
367 rules we have gone far enough.

The Court: I am not ruling on that yet.

Mr. Fihelly: An expert on what?

Mr. Brodsky: Expert on the proceedings and actions of the committee.

Mr. McCabe: He has testified he has followed it very closely, and I wish to qualify him further by showing a particular reason why he has devoted a good bit of attention to their activities—because of the impact on himself and on organizations of which he is a member and on the constituents who have regularly voted for him for a number of years.

The Court: You have made your record on that.

Mr. McCabe: I have qualified him as an expert witness?

The Court: I would not say he is qualified as an expert. He is qualified to give testimony with respect to matters concerning which he has personal knowledge. I do not know what you mean by qualifying him as an expert.

Mr. McCabe: Let me make this offer, then. I offer to prove by him that he has studied the standards which this committee has set up in their judgment of what is un-American and what is subversive. He has made a particular study of that and is prepared to quote what members of the committee have said.

Mr. Fihelly: That has nothing to do with the issues in this case, your Honor, under Title II, Section 192.

368 The Court: I sustain the objection to that testimony.

Mr. McCabe: Your Honor grants me an exception to that?

The Court: Yes, indeed.

(Counsel resumed their places at the trial table, and the following occurred:)

By Mr. McCabe:

Q. Congressman Marcantonio, during the Government's case there was testimony concerning the personnel of the House Committee on Un-American Affairs, and among the persons designated as a member of that committee was Congressman Rankin—

Mr. Fihelly: Just a moment. I ask that this proffer of evidence be made at the bench.

The Court: I do not know what he is leading to, but it looks as though it is repetitious of some other questions.

Mr. Fihelly: The matter has already been submitted to your Honor and ruled on, and counsel knows it.

Mr. McCabe: I do not think this has.

The Court: If there is ~~any~~ doubt about it, you had better come up here.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: I propose to prove through this question that Mr. Rankin is not a Member of Congress, not a law-
fully elected Member of Congress, and is not a mem-
369 ber of any committee of Congress.

Mr. Fihelly: It has nothing to do with the issues of this case.

The Court: I sustain the objection. I think that is covered.

Mr. Fihelly: That is Defense No 1.

Mr. Brodsky: I want to make sure we are getting a witness through whom we are making a proper proffer of proof. Your Honor has ruled on that?

The Court: Very well.

(Counsel resumed their places at the trial table, and the following occurred:)

By Mr. McCabe:

Q. Congressman Marcantonio, were you in attendance at a session of Congress held Tuesday, April 22, 1947, at which Mr. Thomas, chairman of this committee, offered a privileged resolution, and, for the purpose of allowing the witness to refresh his memory, is there any objection to my showing him the Congressional Record?

Mr. Fihelly: No objection.

The Court: You may show it to him.

By Mr. McCabe:

Q. I direct the attention of the witness to the Congressional Record for Tuesday, April 22, 1947, particularly at page 3929, second column. I ask the witness to re-
370 fresh his recollection by looking through the preceding pages (handing a document to the witness).

A. Yes.

Q. I show you three documents which have been marked, respectively, Defendant's Exhibits 1, 4-A and B, A consisting of an envelope, and 5. I believe it is agreed that the contents are identical. They consist of a statement made by Mr. Dennis in explanation of his nonappearance on April 9, or of a letter containing the same material.

Mr. Fihelly: Mr. McCabe, I will admit, to save time, as far as I know, none of those documents were ever submitted in detail to the Congress.

Mr. McCabe: I would like to have it from the witness and ask Congressman Marcantonio this question.

By Mr. McCabe:

Q. In the discussion whether or not the House should act on that special resolution citing Eugene Dennis for contempt, was that letter containing Dennis' explanation for his failure to appear presented for the consideration of the House? A. It definitely was not.

Q. I direct your attention to one portion of the proceedings in which, I believe, reference was made to it. That is in the testimony of Mr. Mundt, third column of page 3930.

Do you recall that a statement was read there pur-
 371 porting to be from a letter sent by Mr. Dennis (hand-
 ing a document to the witness)? A. I recall listening
 to Mr. Mundt's speech. I participated in the debate and I
 was present, and I remember Congressman Mundt's speech,
 and I do recall his making this statement, substantially.

Q. What was the statement that he made there?

Mr. Fihelly: Is that the one that was read before?

Mr. McCabe: The one statement, "This is to"—

Mr. Fihelly: Is that the one that Mr. Mundt was ques-
 tioned about this morning?

Mr. McCabe: Yes.

Mr. Fihelly: I thought so.

The Witness: "I will read the first statement of his
 attorney's statement. This is to inform you that I shall not
 attend the meeting of your committee on April 9, 1947."

By Mr. McCabe:

Q. Did Mr. Mundt or anybody else read anything further
 of the eleven pages of that letter? A. None at all.

Q. By the way, have you, Mr. Marcantonio, read the
 reports of this committee as issued from time to time? A.
 Yes.

Q. Are you familiar with the activity which this com-
 mittee took within the last two or three weeks with
 372 regard to the Southern Committee on Human Wel-
 fare?

Mr. Fihelly: If your Honor please, that is irrelevant and
 immaterial to the issues of this case.

The Court: Yes. That has been up before. Of course,
 the answer to this is yes or no. He may answer yes or no.

By Mr. McCabe:

Q. Are you familiar with it? A. Yes, definitely.

Q. Do you know whether or not, in its consideration of
 the characterization as subversive which it applied to the
 Southern Conference on Human Welfare, the House Un-
 American Committee had before it any members or repre-

sentatives of that committee? A. I definitely know that they did not.

Q. And do you know how they characterized that committee? A. The characterization was that it was subversive, or substantially to that effect.

Q. Do you recall whether the House Committee at that time described any action which they would take regarding a meeting to be held in Washington to be addressed, under the auspices of that committee, by the former Vice President, Mr. Wallace? A. Well, the statements that were issued I believe by Chairman Thomas of the committee was that the meeting would be covered, that there would be agents of the committee to spy on the meeting, to see who was going to the meeting, and to make records of what was said. That statement also appeared in the press.

In the report filed by the Committee on Un-American Activities on the Southern Conference for Human Welfare, there is one thing that stands out, and that is that nowhere—

Mr. Fihelly: If your Honor please, I think the question has been answered. This is a dissertation that the learned counsel is giving the Court and the jury.

The Court: I sustain the objection.

Mr. McCabe: Will your Honor grant me an exception?

By Mr. McCabe:

Q. I will ask the witness now to state what it was that the committee had to say regarding the Southern Committee on Human Welfare.

Mr. Fihelly: It is irrelevant and immaterial and, if your Honor please, I have been patient in letting it go as long as I have. I object to it as irrelevant and immaterial.

The Court: Sustained.

By Mr. McCabe:

Q. Are you familiar, Congressman Marcantonio, with the personnel of the leading members of the Southern Committee on Human Welfare? A. Yes.

374 Q. Are you familiar with the aims of that committee? A. Yes.

Mr. Fihelly: If your Honor please—just a moment, sir—this is irrelevant and immaterial. It has nothing to do with the defendant's in this case having made a wilful default.

The Court: Sustained.

Mr. McCabe: Your Honor will grant me an exception?

By Mr. McCabe:

Q. What are the aims of that committee?

Mr. Fihelly: I object, if your Honor please.

The Court: Sustained.

By Mr. McCabe:

Q. And what have been the activities of that committee—

Mr. Fihelly: Same objection.

Mr. McCabe: Let me finish the question, to get a record.

By Mr. McCabe:

Q. —the activities of that committee during the years in which you have been familiar with it?

The Court: Do you object to that?

Mr. Fihelly: I am objecting, yes.

The Court: Sustained.

By Mr. McCabe:

Q. To your knowledge, Congressman Marcantonio, has there been anything subversive or un-American in the activities of the Southern Committee on Human Welfare?

375 Mr. Fihelly: I object, if your Honor please.

The Court: Sustained.

Mr. McCabe: Cross-examine.

Cross-examination

By Mr. Fihelly:

Q. How many members of the Communist Party do you know, Mr. Marcantonio? Many or few? A. I know some.

Q. How many do you know? A. I know Mr. Dennis.

Q. How long have you known him? A. I have known Mr. Dennis for about 4 or 5 years.

Q. Under what name did you know him during the 4 or 5 years? A. Eugene Dennis.

Q. Did you ever know he used any other name? A. Not to my knowledge.

Q. You know he is secretary of the Communist Party, don't you? A. I do.

Q. A good friend of yours, isn't he? A. I would say that Mr. Dennis has been to see me on several occasions with regard to particularly the questions of labor, the defense of labor's rights and defense of Negro rights in
376 America.

Q. Now, how many other Communists do you know? A. I know some in my Congressional District.

Q. Name the Communists whom you know.

Mr. McCabe: That is objected to, your Honor. I have no objection to his qualifying this witness as to his acquaintance with Communist Party members, but as to the individual members, I think that is entirely irrelevant to this issue.

The Court: What do you have to say to that, Mr. Fihelly?

Mr. Fihelly: I say this, if your Honor please. I have asked him whether he knew many or few. He evaded me.

Mr. McCabe: That is objected to.

The Witness: I did not evade anything in the case.

By Mr. Fihelly:

Q. Do you know many or few Communists? A. I know some.

Q. Can you answer whether you know many or few, sir?

Mr. McCabe: That is objected to. Just a moment. That is objected to, because what might mean many in Mr. Marcantonio's mind might be few in Mr. Fihelly's mind.

Mr. Fihelly: I will withdraw the question.

By Mr. Fihelly:

Q. How many do you know? A. I should say about 20, 25.

Q. I will ask you one more question. Do you approve of the principles and philosophies and political teachings of the Communist Party? Yes or no.

A. I still believe in the capitalist system as is.

Mr. Fihelly: May the question be answered, if your Honor please?

The Court: Yes. Answer the question.

The Witness: All right—

Mr. McCabe: I would say that the question is something that cannot be answered yes or no, if you approve the principles. Now, according to logic—

Mr. Fihelly: The system—

Mr. McCabe: Just a moment, Mr. Fihelly. Don't get excited.

The Court: Do you object to the question?

Mr. McCabe: I object to the question.

The Court: I sustain the objection.

By Mr. Fihelly:

Q. Among your acquaintances, how many friends do you have who are Communists? A. May I say something to the Court?

The Court: No.

Mr. Fihelly: Just a moment. No.

The Court: Unless you want to correct some statement you made.

The Witness: No, but I think since I am a public official, that kind of question should not be permitted to be left up in the air.

Mr. Fihelly: I think it should be answered. I would like to see it answered.

The Court: Counsel objected. I sustained the objection.

Mr. McCabe: I objected to the form of the question, in which he said, "Do you approve the principles?" That means all the principles. If he approves one principle, then, of course, his answer would have to be no.

The Court: I asked you if you objected. You said you did. I have sustained it. There is nothing before me at this moment.

By Mr. Fihelly:

Q. Among your friends and acquaintances, how many close friends do you have who are members of the Communist Party? A. I have no close friends that are members of the Communist Party. I have very few close friends in my life.

Q. Aren't you in Congress the champion of the Communist Party? A. I am the champion in Congress of democratic rights in America. I have been fighting to sustain this Constitution of ours against the invasion of domestic fascism, Ku Klux Klanners, enemies of labor, and enemies of democracy.

Q. And haven't you fought fight after fight for the Communist Party in the halls of Congress? A. I have fought for the constitutional rights of the Communist Party in defense of democracy. Read the Congressional Record and you will find that every word here today I have said in the Congress of the United States.

Mr. Fihelly: I have no further questions.

Mr. McCabe: That is all.

The Court: You are excused, Mr. Congressman.

(The witness left the stand.)

Mr. McCabe: If your Honor please, the defense offers in evidence—I think I have already offered in evidence—exhibits 1, 2, 3, 4, and 5, and the defense rests, your Honor.

The Court: Is there any rebuttal?

Mr. Fihelly: No rebuttal. We are ready to argue the case, or even willing to submit it without argument.

Mr. McCabe: At this time—

The Court: Do you wish to come to the bench to make a motion? Will it be a protracted argument or just a renewal of the motion?

(Counsel for both sides approached the bench, and the following occurred:)

Renewal of Motion for Acquittal.

Mr. McCabe: I simply would like to make again a motion for a directed verdict of acquittal.

The Court: The motion is denied.

(Counsel resumed their places at the trial table, and the following occurred:)

380 **Discussion on Prayers for Instructions.**

The Court: Now, Mr. District Attorney, do you have any prayers?

Mr. Fihelly: No, your Honor.

The Court: Do you have any prayers, Mr. McCabe?

Mr. McCabe: Yes.

The Court: Are there a number of them?

Mr. McCabe: Yes.

The Court: Well, the jury will retire from the room while these requested instructions are discussed.

(The jury left the courtroom.)

Mr. McCabe: If your Honor please, I hate to ask you to read a hieroglyphic note. Mr. Freedman has handed me some. They seem to be fairly legible.

The Court: If I cannot read them, I will ask for a translation.

Perhaps they had better be shown to Mr. Fihelly, to see whether he has objections.

Mr. McCabe: Thank you, your Honor.

The Court: We will come to that after we finish the typewritten requests.

How about No. 1, Mr. Fihelly?

Mr. Fihelly: It is objectionable.

The Court: I will deny it.

No. 2.

381 Mr. Fihelly: It is objectionable.

The Court: I will deny it.

Mr. McCabe: I will take an exception to all those denied at the end, instead of doing it seriatim, your Honor.

The Court: Just as you wish.

Do you object to No. 2?

Mr. Fihelly: Yes, your Honor.

The Court: Denied.

No. 3, Mr. Fihelly?

Mr. Fihelly: I object to it, your Honor.

The Court: No. 3 is denied.

I am denying these without further argument because up to this point they raise the same questions which had been discussed rather fully. I assume you do not care to reiterate what you had to say then?

Mr. McCabe: No; I think the exception would cover it, your Honor.

The Court: I did not want you to think that I was depriving any argument you wished to make.

Mr. McCabe: It would be the first time during the course of the trial, your Honor, and I know it would not happen.

The Court: No. 4.

Mr. Fihelly: It may be true as an academic statement, but I do not think it has any place here.

The Court: Denied. No. 5.

382 Mr. Fihelly: I object to it.

The Court: Denied.

No. 6.

Mr. Fihelly: I object to it.

The Court: Denied.

No. 7.

Mr. Fihelly: I object.

The Court: Denied.

No. 8.

Mr. Fihelly: I object to it.

The Court: Denied.

No. 9.

Mr. Fihelly: I object to it, your Honor.

The Court: Denied.

No. 10.

Mr. Fihelly: I object to it.

The Court: Denied.

No. 11 will be denied.

No. 12 will be denied.

No. 13. How about No. 13, Mr. Fihelly?

Mr. Fihelly: I think this, your Honor, that under the rulings which have been made in the case, particularly by Justice Keech, and other rulings made by the Court, there is a presumption, which has not been rebutted in this case, that the committee was properly organized, was properly functioning, and there is a presumption that it was sitting for legislative inquiry purposes. There has been nothing to the contrary here in evidence.

The Court: I will deny it on the ground that there is no evidential basis for it.

No. 14.

Mr. Fihelly: It is about the same thing, your Honor.

The Court: I will deny that.

I will deny 15.

I will deny 16.

I will deny 17.

I will deny 18.

How about 19? I think that is a good prayer.

Mr. Fihelly: It differs a little bit from your Honor's ruling, that is all. It does concur with my general views on it, your Honor, as I argued them to the Court.

The Court: My view is that the word "wilful" means intentional, and that a wilful default means a deliberate, intentional default. This prayer says that you cannot find that he wilfully defaulted simply by his nonappearance. It has to be intentional.

Mr. Fihelly: I had no objection to the prayer, but I had in mind what your Honor said about an individual being ill.

The Court: That would be a technical violation.
 384 Being ill, he would intend not to appear.

Mr. Fihelly: I have no objection to it as it is worded.

The Court: I will grant 19.

I will deny 20.

I will deny 21.

I will deny 22.

I will deny 23.

Now, I will look at that one that was submitted on yellow paper.

Have you read it yet?

Mr. Fihelly: I have not had a chance to. I will be glad to submit them to your Honor, if there is any doubt about it, to save time.

The Court: Is there any objection to 24, Mr. Fihelly?

Mr. Fihelly: I have no real objection to 24, your Honor.

The Court: I will grant No. 24.

I will deny 25.

I will deny 26.

I will deny 27.

There are two 27's.

Now, may I ask you to change 27 to 28, 28 to 29, and so forth?

I will deny 28.

I will deny 29.

I will deny 30.

385 I wish you would look at 31, Mr. Fihelly.

Mr. Fihelly: That matter was already passed on by Mr. Justice Keech, your Honor.

Mr. McCabe: I do not think the rulings of Mr. Justice Keech are binding on this Court.

Mr. Fihelly: It was argued before Mr. Justice Keech.

The Court: I do not believe that is binding on me, however.

Mr. Fihelly: I agree with you, but if your Honor follows that as a matter of law, that would be binding and would be the end of it in the case.

The Court: If what?

Mr. Fihelly: If your Honor follows Mr. Justice Keech—I agree that your Honor has to pass on it as a matter of law one way or the other—and follows the other judges who have made decisions, including Judge Caffey in New York in the Josephson case—and I have the opinion here—that prayer would be improper and irrelevant; and also Mr. Justice Holtzoff, in his opinion, made the same decision in the written opinion in the Barsky case.

The Court: Where is that covered in Mr. Justice Keech's opinion? What page is it?

Mr. Fihelly: I have it on page 5, your Honor.

The Court: Is it the bottom of the page?

Mr. Fihelly: No; right at the top. The second
386 paragraph seems to go right into it.

The Court: Justice Keech's opinion relates to the resolution. This prayer relates to the committee's action in respect of standards. Probably the same reason would be applicable.

Mr. Fihelly: That is what I had in mind.

The Court: I will hear you, if you care to be heard, Mr. McCabe, on that prayer No. 31.

Mr. McCabe: I wonder if you will hear Mr. Freedman on that, your Honor. Frankly, I am not familiar with that.

Mr. Freedman: If your Honor please, on this question, this request to charge is related to section 192, which is the offense charged here, which says that the committee, of course, may subpoena or summon witnesses upon any matter, and that has been judicially determined in the cases which have come before the court to mean any matter lawfully within their jurisdiction under that statute.

Now, if that is so, then no witness may be lawfully brought before them except if they have some purpose which they lawfully had a right to summon them on within the jurisdiction which had been conferred upon them—that is, some lawful matter.

The resolution on its face was to investigate subversive and un-American propaganda activities. What those ac-

tivities were we have tried to find out from Mr. Thomas when he was on the stand—that is, whether or not they had a recognizable standard which would meet the test of the statute—that they were subpoenaing witnesses for a purpose which they were given authority to do.

Now, unless they had a standard, a recognizable standard, either for themselves or for a witness who was called before them, there is no way of knowing whether or not a man who is being summoned for a purpose for which they had a right to summon him was legally summoned; and we feel, therefore, that that goes to the very heart of the subpoena issued in this case, as it would to a subpoena issued in any other case, namely, whether or not the witness was being summoned for a purpose for which they had a right to summon him.

In this case we say the mere language of the resolution and the statute—since they both operate under the statute, and the resolution, which embodies that—since they operated under that statute, which itself provides no standard, and they themselves had no standard, no witness would know whether he was being summoned for a purpose for which they had authority to summon him.

We therefore ask your Honor to charge the jury that unless they find that the witness was being summoned by the committee for a purpose for which they had a lawful right to summon him, that summons in essence was not a valid summons, and the violation or refusal to obey that summons would not in itself constitute a contempt.

I think that is the essence of what is intended to be covered by this requested charge, for which there is some authority or basis in the testimony given by Mr. Thomas, that they had no standard except as each individual member of the committee had something in his own mind.

Mr. Fihelly: Of course, your Honor, you get back to the statute. Whoever, having been summoned, wilfully makes default, it says.

In the Sinclair and other cases they say, even if counsel advised you, as they claim this man was, that was irrelevant and immaterial if you were summoned and wilfully made default, in addition to the justices having found that there were standards and that that attack was improper.

Mr. McCabe: Of course, the word "wilfully" was not in the statute under which Mr. Sinclair was convicted.

Mr. Fihelly: Of course, we have already argued that. I have argued that to the Court, Mr. McCabe.

The Court: I will deny 31.

Now, you said you wish to note exceptions to each and all that I have denied, Mr. McCabe?

Mr. McCabe: Yes, your Honor.

The Court: Very well. Exceptions will be noted.

How much time did you say you wanted, Mr. Fihelly?

Mr. Fihelly: I do not think I will need over 20
389 minutes.

The Court: How much do you want, Mr. McCabe?

Mr. McCabe: I would say about 20 or 25 minutes, but it is my own observation that when I say I need 25 minutes it indicates it is a lawyer's 25 minutes, which may run 28 or 30 minutes.

The Court: Not in my court. When I fix times for argument, I have found by experience that I must limit it to that. So you fix the outside limit and then understand you do not have to take that limit.

Mr. McCabe: I would say that 45 minutes would be the outside, and I say I hope I will be considerably shorter than that.

The Court: That will probably send it to the jury rather late, 4 o'clock. Unless you gentlemen have some engagement tomorrow, I think it would be wise to let the argument and charge go to the jury tomorrow.

Mr. Fihelly: No objection.

Mr. McCabe: That will be satisfactory.

The Court: You said something about engagements in Philadelphia. I want to accomodate you.

Mr. McCabe: I was able to let that case go over. I appreciate it.

The Court: If there is no objection, I will continue the case until tomorrow, so that the arguments and the submission of the instructions by the Court to the jury
390 will be over probably before the end of the forenoon.

Bring the jury in, Mr. Marshal.

(The jury returned to the courtroom.)

The Court: Members of the jury, the case has now been closed so far as the taking of testimony is concerned and so far as legal matters are concerned that involve the taking of testimony.

I have suggested to counsel, and they have agreed, that the case go over until tomorrow, in order to hear their summations and my instructions, and then submit the case to you probably before 12 o'clock. That will keep you from staying here too late this evening.

So you are excused until tomorrow morning at 10 o'clock, and keep in mind my admonition to you not to discuss this case with anyone or allow anyone to discuss it with you, not to read the newspapers or newspaper accounts about it, and not to listen to the radio.

PROCEEDINGS.

394 Mr. Fihelly: If Your Honor please, there are two brief matters I would like to take up at the bench that should be taken up.

(Counsel for both sides approached the bench and the following occurred:)

Mr. Fihelly: I have two brief matters I want to discuss. I think Your Honor made a very wise decision in putting argument over until this morning. When we were talking about the time yesterday, I mentioned I would take 20 minutes. I figured we were going to the jury then, but I don't think I will take over 30 minutes.

The Court: I shall give each side the same time.

Mr. Fihelly: I don't think I will take over 30 minutes.

In addition to that, I have these two brief prayers that I have drawn up overnight. I will give counsel copies of them.

The Court: I will cover number 1 in my general instructions.

Number 2 does not have all the elements. I think that there are more elements than that.

Mr. Fihelly: That was the charge Judge Holtzoff gave.

The Court: Well, now, I think that there are more elements than that. The first element is that the chairman of the committee caused to be issued and prepared
395 a summons or subpoena directing this man to appear.

Mr. Fihelly: That is right.

The Court: Mr. Dennis can come to the bench if he wants.

You are entitled to come up here, Mr. Dennis. Your counsel said yesterday that you did want to come up.

(The defendant approached the bench.)

The Court: The first element is that the chairman caused to be prepared a subpoena or summons directing the defendant to appear on the date named and at the place named to testify on matters committed to the committee by law.

Mr. Fihelly: That is right.

The Court: The second element is that the chairman authorized Mr. Stripling to make service of that summons or subpoena.

The third element is that Mr. Stripling did serve that subpoena in that he placed the same in the possession of the defendant.

The fourth is that the defendant, knowing that he had been served with a summons or subpoena, made wilful default, that is to say, he failed to appear on the date and the time specified in the subpoena; that the term wilful,

as I have held, means an intentional and deliberate default, not an accidental nor an inadvertent default; and that motive upon the default is immaterial. Generally speaking, those are the elements which I shall tell them
 396 must be established beyond a reasonable doubt before they may find the defendant guilty. If each and all of these are not established beyond a reasonable doubt, their verdict should not be guilty.

Mr. Fihelly: I think two or three of these are included in the fact of the summons.

The Court: I do not like it that way.

Mr. Fihelly: I will admit two or three of them were folded into one.

The Court: I will deny number 1 and 2 and will cover them in my general charge along the lines I have indicated.

Mr. McCabe: May I suggest this: It might be important. Your Honor said one thing they must establish is that the chairman directed the issuance of the subpoena.

The Court: That is what the statute says.

Mr. McCabe: It has in that issued under the signature of the chairman, or any chairman of a subcommittee, and at the direction of the chairman.

The Court: Well, the chairman did in this case, according to his testimony.

Mr. McCabe: The reason he gave: He said he signed the subpoena in blank so that if he went out of town Stripling would have it.

The Court: I thought in this case it was more restrictive to bring it down to the proof. I thought that was to
 397 the defendant's benefit, but I see no objection if you want me to do so, to say that the subpoena was directed to be issued by the chairman, or whatever the statute says. There is no evidential basis for anything about the chairman in this case.

Mr. McCabe: Outside of this: The subpoena, that blank subpoena was used and that had been prepared for emer-

gency and no emergency existed in this case. The chairman was there.

The Court: I think I will give it that the chairman had the right, and that is the only thing for which there is any evidential basis. If I go beyond that it will put the jury in the realm of speculation.

Mr. McCabe: That is right; there is point to that.

There may be no objection when it is given.

The Court: When I am through with the charge, come to the bench and make your objections.

Mr. McCabe: Now, the thought occurred to me, and this may be somewhat far fetched, as to whether or not we would be entitled in this case to a charge on circumstantial evidence. In other words, the jury is asked to find wilful default from certain circumstances, circumstances that are in non-appearance.

The Court: You mean, the usual charge on reasonable hypothesis of guilt?

Mr. McCabe: Yes.

The Court: Do you have any objection to that?

308) Mr. Fihelly: No.

May I have the exhibits.

The Court: I have not all of them. I have some.

Mr. Fihelly: I would like to have them.

The Court: When you are through, will you let me have them back?

Mr. Fihelly: Yes.

The Court: I think I will need them in the charge.

(Counsel resumed their places at the trial table and the following occurred:)

The Court: I am directing the clerk, gentlemen, to put all the briefs and papers that you submitted during the course of the trial into the file so that they will be in there.

Did you say you wanted 45 minutes?

Mr. McCabe: Yes, sir.

The Court: Each side will be allowed 45 minutes. Here is another exhibit, Mr. Fihelly.

Mr. Fihelly: This one I will need, Your Honor.

May I proceed?

The Court: Yes.

Opening Argument to the Jury on Behalf of the United States.

Mr. Fihelly: May it please Your Honor and you ladies and gentlemen of the jury and prospective juror: Court opened this morning with the substantial words:

399 "God save the Government of the United States and this Honorable Court." Now, may the courts always be opened in this District with those words.

You ladies and gentlemen of the jury are privileged to try one of the most important cases that has ever been tried in this District, the case of the United States against Eugene Dennis, secretary of the Communist Party.

The evidence in this case shows that Dennis set himself up as the single, as the leader of the Communist Party, and believed he was bigger than and greater than and more important than the United States Government. God help us if he or anyone else, as the symbol of that party, gets away with that, if I may use the language of the street.

The issues are very simple in this case. They are so simple, ladies and gentlemen of the jury, that we have had hundreds of red herrings drawn before you so you could not see the simple issues.

Title 2, Section 192 of the United States Code, as I told you members of the jury before, and as His Honor will tell you, states that whoever takes wilful default while having been summoned by a committee of Congress, takes wilful default, is guilty of a misdemeanor.

Now, the only issues in the case are: Was this defendant lawfully summoned to appear before a committee, the Committee on Un-American Activities, and again, 400 did he wilfully default. By those words, wilful default, as His Honor will tell you, is meant did he

deliberately and intentionally default from the appearance after having been lawfully summoned.

As I say, there have been a lot of red herrings run across this case to distract you from the real issues in the case.

As you go along later on and hear from counsel for the defense when he addresses you, think and say to yourself in that argument: Is he meeting the issues of this case, the simple issues? Then you will see where the red herrings go and where they fall.

Has the defendant answered the questions? What did Mr. Marcantonio tell you? He didn't answer them. His defense has not been answered by any witness.

First, was the defendant lawfully summoned by the Committee on Un-American Activities on March 26 of this year, and secondly, did he intentionally and deliberately default? Marcantonio had nothing to say about that, but he went over and shook his hand and wished him luck. About Marcantonio, I will have more to say about him later.

On the evidence in the case, when counsel is talking to you, think of these single issues, the simple issues, and think farther when he addresses you, ladies and gentlemen, whether he is meeting the issues, whether he is on the beam. I am going to stay on the beam, and when
401 counsel addresses you, think whether he is on or off the beam.

We placed before you Resolution 601 of the Seventy-ninth Congress, which put into existence this Committee on Un-American Activities, and it stated that the committee has a right and had a duty and was empowered to examine into and investigate un-American activities and subversive propaganda in the United States and to make a report to Congress, if necessary, with respect to remedial legislation.

We placed another resolution before you, and there is no dispute between defense counsel and myself, no evidence contradicting this, and this same resolution was carried again into existence, and the committee was em-

powered to function further under that same law 601, and we find that the individuals who were appointed on that particular committee were as follows:

John Parnell Thomas, of New Jersey, chairman; Karl E. Mundt, of South Dakota; John McDowell, of Pennsylvania; Richard M. Nixon, of California; Richard B. Vail, of Illinois; John S. Wood, of Georgia; John E. Rankin, of Mississippi; J. Hardin Peterson, of Florida; and Herbert C. Bonner, of North Carolina. We have a universal committee in its selection from the various States, and it has been stated to you, ladies and gentlemen, and there is no dispute about it, that the Congress of the United States thought that this committee was important enough to become a standing and permanent committee, despite what Marcantonio thought of it.

402 There are 435 members of Congress, and Marcantonio was the only individual who voted against citing the defendant. Not only that, but he shook his hand when he left the stand. Birds of a feather flock together. I am sure that Marcantonio will get a fusillade of communist votes when he is up for election.

Mr. McCabe: I do not think that the Communist Party is up on trial.

The Court: I shall instruct the jury the Communist Party is not on trial.

Mr. Fihelly: I understand that.

In addition to the committee having been made a standing committee, ladies and gentlemen of the jury, we have the fact as has been stated by counsel and reemphasized in his questions to you when we were all attempting to get a fair and impartial trial jury, that the President of the United States issued a Loyalty Order, and we have all those facts to consider.

I am sorry to find out also, and I might go into it before I go over the evidence that Mr. Marcantonio, from questions that have been propounded to him by defense counsel, and I am very sorry it happened, that they bring in a race

question into this case. There is one thing I have always found that takes the race question out of the picture and brings them all close together, and that is when any foreign

or domestic dictator attacks American institutions.

403 There is no color of citizens; we find them all alike and it wipes out racial problems, and it solves them, and it has done it again and again, and it will do it in this case, despite the emotional appeal of counsel to certain members of this jury, who are all American citizens.

The evidence in this case shows, ladies and gentlemen of the jury, uncontradicted, that this committee was functioning properly on the 26th of March and on the 9th of April, and they were investigating and inquiring into the activities of the Communist Party and its members in the United States.

The defendant in this case, about eight days before March 26, wired the chairman of the committee and said: I would like to appear as a representative of the Communist Party before your committee, and a wire was sent back: You may appear.

Then another wire: How much time can I have? And the response was: You may have two hours.

On March 26 the defendant appeared before the committee, and there was a quorum and there was a lawful meeting. The question was propounded by Mr. Stripling, who was authorized to ask that question: What is your name? The defendant said: Eugene Dennis.

Questions were asked then by Mr. Stripling as to whether that was his right name, his proper name, and there was no answer.

404 Mr. Thomas, the chairman of the committee, then attempted, and the evidence is he asked four or five questions along that line, and in answer to the question, the man who wanted two hours to talk would not talk for two minutes.

Mr. Peterson, another member of the committee, then asked one of these questions as to his name, and there was

a refusal to answer, and you get the answer, as Mr. Stripling answered: My hair is brown and my eyes are blue.

Well, the eyes of this jury are not blind at all, and the ears of this jury are not deaf at all.

You have heard the evidence in this case and you have seen what has happened. You have heard the testimony which has been given here by this chairman of the committee, Mr. Thomas, who said to Mr. Stripling to serve a subpoena on this man.

Mr. Stripling got hold of Russell, his assistant, and told him to prepare a subpoena. The subpoena having been prepared, and the blank signature was there, and we will come to that later. I will come to that alleged defense later.

Mr. Stripling struck out Russell's name because he had been ordered to serve it, on the original subpoena, and went around and served it, and he did serve it on Dennis.

Before serving it and mark you this when you think whether it was wilful and intentional and deliberate,

Dennis said these things, and there is no contradiction, although there were fifty newspaper men in
405 the room, and there was a quorum of the committee, and there is no denial that Dennis said: I hold this committee in contempt.

Stripling said: I put it on his hands, and they were this way (indicating). Nellor says he saw it put on his hands at that time. Nellor said he was at the right rear, but there is no doubt it was served because Stripling said to the chairman: Let the record show that he is being or has been served with a subpoena. Mr. Thomas said: The record will so show. Mr. Stripling returns to his desk, and Mr. Nellor stated how it was, and there is no contradiction. No one of the fifty reporters present were called to contradict the testimony that the defendant took the subpoena and tossed it on the table.

We have the subpoena here, and you ladies and gentlemen of the jury know because of the fact that the defendant didn't take that that we have that in evidence. If he

did take it from the committee room, we would not have it. That is the subpoena which was served (indicating), just after he said: I hold this committee in contempt.

I again say: Lord help the Government of the United States if an individual can think he is so big and so bombastic that he can make utterances like that, and defy the law, and defy the Representatives who have been elected by the citizens of this country to represent the Government of the United States.

406 In response to the subpoena by Mr. Thomas, Mr. Stripling said he wasn't there on April 9th.

In addition, there was a wire sent out on the 7th of April, which you have seen, practically setting forth what the subpoena had and notifying him he was to appear before the Committee on Un-American Activities on the 9th of April at the committee rooms in Washington, D. C.

April 9th comes, and there is another committee meeting, and Mr. Thomas is sick, and this defendant could not be bothered to be there. Mr. Mundt, the next ranking member of the committee, is in charge, and he opens the meeting, and there are seven members there. As counsel stated for the defense, there is no dispute. There was a quorum present, and the meeting was called to order, and they called—I say “they.” He called and Mr. Stripling called for Mr. Dennis and no Mr. Dennis was there. The little man who wasn't there—the big man who wasn't there, at least, the man who thought he was big wasn't there. Your verdict will tell him that he is not as big as he thought he was. He wasn't there.

The evidence is that a lawyer appeared for him and presented a statement. That statement has been given to His Honor, and I think His Honor will instruct you ladies and gentlemen of the jury that that statement is not a legal justification for the non-appearance of this defendant
407 at that meeting.

Those, briefly, are the facts. Was there a wilful default? What more evidence could you have, ladies and

gentlemen of the jury? There never was such a wilfulness in any one of these cases as you have in this. The man said: I hold the committee in contempt, and he wasn't kidding. He meant it.

He didn't take the subpoena out of the room, and he tossed it up on the table, and a wire was sent to him to brush up his memory in case he was forgetful. No, he didn't go. He was working up his statement then. He was ready to give the Committee on Un-American Activities, if I may be pardoned, the five fingers. That was his respect for it.

What do you have on the other side in the way of possible defenses? What do you have on the other side? Now counsel has stated a lot and said a lot that it is a sorry state of affairs when the Committee on Un-American Activities can serve a subpoena in blank. There was no blank subpoena served in this case.

Mr. Thomas said through necessity there were probably about six subpoenas signed by him in blank ready for emergency purposes when he was out of town and where he could be called to give permission over the phone to Mr. Stripling, who was one of the investigators, to serve a subpoena.

In this case Mr. Thomas instructed him, following
408 Mr. Schmidt, the preceding witness, he instructed

Mr. Stripling to prepare the subpoena, and they had it ready and later on he instructed him to actually serve it. This subpoena was filled out over the name of Mr. Thomas, which was just as if he signed his name then.

It was filled out, and Mr. Stripling followed his instructions to the letter, and even struck out Russell's name and put his own name in, and pursuant to the command of the chairman of the committee, who had the right to give him the order and direction, he served the particular subpoena on Dennis.

Now, it will also be said, ah, that they were tricking Mr. Dennis. Nobody tricked Mr. Dennis. He tricked himself.

He thought he was going in there and talk for two hours, but he didn't know that the committee knew certain things about him that they did, so he only answered the first ques-

tion, and then he stopped and showed his reactions and his feelings toward the committee.

Is there any evidence that any other witness that was called before this committee on that day or any other day and had no little cloud with respect to the name that we find in this case, for instance, if any one of you members of the jury were there. Mr. Thomas would have the right to ask your name. He would not have hostility to ask it.

The other witness answered the question, but Mr. Dennis saw fit not to answer it, and saw fit not to come back
409 later and make any further answers before the committee. There will be comment probably that he had the advice of counsel before he refused to appear on the 9th of April, and His Honor will tell you that is no defense.

So I say that is a red herring they come in with and that is no defense. It may be argued to you that the committee was hostile.

An individual who is summoned with a lawful subpoena before a committee, such as this, he cannot decide whether he is going to appear. It is his duty to appear lawfully, just as you were given a summons to appear as prospective jurors, and you cannot say I think that the Court is going to be hostile, or I don't like to work there.

You can only run the Government one way, and that is in a lawful orderly way. Suppose a thousand people did what Mr. Dennis did in this case? You are not going to have law and order. You are going to have chaos, and chaos is what the defendant in this case wants.

It may be stated to you that they were not going to call on the representatives of the Communist Party in connection with communist activities until this defendant asked to be called. Mr. Thomas said that there was a hearing held on that, and they decided to serve the representatives of the Communist Party, including the defendant in this case,
410 who would be called. And also despite that they intended to call Dennis and were going to ask questions because they knew all about him, and they knew they

were unmasking him, but he wasn't cooperating with them in that unmasking.

I have in my notes again the name of Marcantonio, so I might as well finish with him. Was there anything that Marcantonio said which answers the issues in this case? Did he say anything to dispute the fact that the defendant in this case was wilfully absent? Did he say anything in this case in his testimony to dispute the fact that the defendant in this case intentionally and deliberately did not put in appearance on April 9th?

No, he didn't, but Marcantonio, dressed for the occasion with his red tie, went over and shook hands with the defendant and said: I wish you luck.

Now, when Marcantonio was on the stand he made some mention of the Southern Conference for Human Welfare, and all the trick names that they get and sugar coating they put on the names, and that particular inquiry had been ruled out by the Court on a prior occasion, and he said he didn't know what the evidence was and said he believed that the Committee on Un-American Activities had no evidence before it when they branded this committee a front for communism.

On the other hand, he stated that Mr. Wallace appeared as a speaker before that committee. Now, many an able intelligent man has been taken in. Henry Wallace
411 could have been taken in. I believe he was, but is there any evidence that Mr. Wallace, the former Vice President, took any evidence or made any search before he went to speak before this gathering?

And then Marcantonio went into it further and said they sent their men down to spy on the meeting. What was there about spying, when you have a public gathering, and they announce in the press that that is objectionable and was a front for communism, and they said we are going to send our representative, an investigator to be there to see what happened. If that is spying, I don't know what the word spying means. They announced what the organization was

going to do and what they were going to do, just to have a representative there to see what happened.

There have been questions asked with respect to Mr. Rankin, and that is only brought in for a particular purpose. That particular purpose was argued before another court when motions were filed and heard, and was made in this court, and before, as in this case, the Presiding Justice decided it was irrelevant and immaterial. On the other hand, this is a lawful committee functioning, the Committee on Un-American Activities.

I will tell you ladies and gentlemen of the jury, frankly, that if the things Mr. Rankin and Mr. Bilbo are alleged to have done are proved that neither one of them should
412 be members of Congress, but under the Constitution as counsel for the defense has been talking to you, and will talk to you, I should say Article I, Section 5, says that the Congress and the House of Representatives shall be the sole individuals to judge the qualifications of their membership and who shall be members of Congress.

A motion was already made in this case and ruled out, that the courts having nothing to do with the membership of that committee, and they don't have anything to do with it but that is another red herring before you, but you be ready for it when you come to it, and you can smell it coming.

That, ladies and gentlemen of the jury, about covers the evidence in this case. The issues are simple, although the case is most important. Remember the issues, remember the evidence, and remember that there is no contradiction by any witness to that evidence, and, ladies and gentlemen, under your oaths as jurors you can only return one verdict, a fair one, a just verdict, a verdict of guilty against this defendant, who thought he was more important than the Congress and more important than the Government of these United States.

Argument on Behalf of Defendant.

Mr. McCabe: Ladies and gentlemen, you know, often a lawyer, in getting ready to plead a case and to address the jury, makes notes, and then he very often forgets the notes and very often he finds that opposing counsel has very nicely, perhaps in other words, made a speech for him.

In this case I think my friend devoted a considerable portion of his speech telling you what I was going to say, so that it really seems a little foolish for me to repeat what he has said.

I agree with Mr. Fihelly that this is a terribly solemn case; that when that crier said, "God save the United States and this honorable court," he was opening the session of the court which is convened for the purpose of protecting this defendant and every other defendant brought before a jury from the unjust enroachments of oppression. Yes, God save the court. Thank God for a court in which a trial can be had—trial by a jury, trial by a jury of his peers—and that is a right which was not given the people on a silver platter. It was a right for which they had to fight. It is a right given to every person accused of wrongdoing in this country and granted to every person except in certain benighted portions of this country.

It is a right which was not given to the million people whose names appear in the card index of this House
414 Committee on Un-American Affairs. You heard the answer of Mr. Thomas to the question whether any right to trial, whether any right of refutation, was given to the million people whose names are in his files as suspect—suspect of being disloyal persons, being subversive. There was no trial given to them.

Not one of them, by Mr. Thomas' own admission, was ever called before that committee and told, "We have a suspicion that you are guilty of subversive ideas or associations. What do you have to say about it? We are here to hear what you have to say."

That is a serious thing, members of the jury. Do you realize that is a million names? That means one out of every 130 or 140 names of persons in the United States is in those files. Without any right of refutation on his part. Without any idea how that name got there. No standard for it.

You heard me ask Mr. Thomas, and he admitted there was no judicial standard for what constitutes un-American activities, what constitutes subversive activities. He said, "Each one of us has his own standards."

Now, whose standards are to govern the security, the liberty, the right to work, the right to be off the black list? Whose standards are the Government's?

You saw Mr. Thomas on the stand. Are they his standards? Are they Mr. Mundt's? Are they Mr. Rankin's?

Are they Mr. Peterson's?

415 Mr. Thomas said, "I can't answer for the standards of those other persons. I have my own standards."

If the actions of Mr. Thomas in this case are representative of his standards of the way a person should be treated, I shall ask this jury to draw the proper conclusions from that, to draw their conclusions as to the standards which govern this committee.

Remember, this committee has its sole purpose and its sole right to subpoena persons to come before them only in conformity with their right to investigate un-American propaganda. And if they do not know what is un-American, if they have no standards for what is un-American, I say they have no right to subpoena anyone, no right to any existence.

Each one of you men and women on this jury has more than 150 friends. Do you realize that at least one friend, and probably more of them, is on that list? Some of you gentlemen work in the post office. There are more than 150 employees there, I take it. Do you realize that, by the law of averages, some of your fellow employees are on Mr. Thomas' card index?

Extend that throughout the country, to every gathering to which you go, where more than 150 people gather, whether it be a church meeting, a fraternity meeting, a club meeting, or a study group. You find these names on the secret files of this committee. I suppose there will be maybe one more name after this trial.

416 Now, Mr. Fihelly talks about red herrings. The first thing he did was to try to put the Communist Party on trial. Referring to the defendant as Eugene Dennis, I am frank to say I started to refer to him as Marcantonio, because Marcantonio was put on the stand in this case—Marcantonio, who came, of his own volition, into this courtroom from the floor of Congress, where he says he has repeated time and again every word that he said here. He did not make up those words for the benefit of Mr. Dennis. He did not conjure up in his own mind those thoughts in order to protect a wilful defaulter from conviction. He stated how he knew Mr. Dennis. He stated, in reply to the baiting of Mr. Fihelly, who immediately started to ask him about how many Communists he knew, yes, he knows some.

From the regularity with which Mr. Marcantonio is sent back to Congress, he must know a lot of Republicans or a lot of Democrats, too, or else he would not be there, because, even according to the count of Mr. Thomas, there are not enough communists to elect him to Congress.

Now, let us get back a moment to our committee. Mr. Fihelly said I tried to show what this committee was and that it was an unconstitutional committee. I did try to show that, and his Honor, with his prerogative—and I have a right to disagree with him—has ruled that out. But I say this jury did have evidence from that stand of

417 what sort of committee this was; did have evidence from two members of the committee and from its chief investigator; and I say, from their testimony, from the Government's own lips and the lips of the Government's other witnesses, you have a right to conclude this defen-

dant's nonappearance on April 9 was far from being wilful—was entirely justified.

Mr. Fihelly has said that I will tell you that this was a trap to get Mr. Dennis down here. Yes, he knew. You holler when you are hurt, just as he hollered about Marcantonio. He hollered about that. He knew it was a trap. Do you think for one moment that that committee would have given any consideration to anything that the secretary of the Communist Party said regarding proposed legislation to outlaw the Communist Party, legislation which was subsequently withdrawn as being unconstitutional? Do you think for one moment that that committee would have given decent, honest consideration to anything that Mr. Dennis said? No.

Mr. Thomas very glibly said, when I questioned him, "Well, now, if you were investigating Communist activities, wasn't it logical to subpoena and inquire of the Communist Party?" "Oh, yes. We wanted the testimony of the general secretary."

If they wanted it, why in the world didn't they invite him? Why did he have to send a long telegram, begging—yes, demanding—the right to speak, not only on behalf of the Communist Party. Here is what he says, after stating that the committee was to hold a hearing:

"Since these bills directly concern the civil rights and status of Communists and the Communist Party, U. S. A., and therefore the democratic rights of all other Americans, I request and insist that I shall be invited."

That is what he was invited for. If Mr. Thomas had been telling the truth, that they wanted his testimony, they would have invited him right away.

I say to you they must have rubbed their hands in glee when they got the telegram. They said, "Now, we've got him. Now, we really have a chance to do something. He is walking right into this mouse trap."

What do they do? Here is a man who comes. They very glibly said, "We are prepared to give him 2 hours. We are prepared to hear him all night."

If they were prepared to hear him for 2 hours, why would they want him back again on another day? Why would they know in advance that they would not get out of him in 2 hours all the information that they wanted from the secretary of the Communist Party? Because they knew that he was not going to be allowed to tell his story. They were going to harass him to the extent that he would not be able to tell his story. If they did not find the excuse that they

419 did use, they would have found another, because they wanted to show Mr. Dennis and any other person who sought to raise his voice in defense of constitutional rights, "You had better stay away. You have no place before that committee." He had no more place before them than any other person whose name was on their black list. So they prepared this little trap.

Mr. Fihelly has said that I will say a lot about the blank subpoena. It was not a blank subpoena which was served. They had filled it in. They had filled it in before they knew that Mr. Dennis would appear that day, before he had appeared. They had it all ready for him. They knew he must have expected to appear, because they had it ready to serve right there.

Mr. Thomas speaks about respect for American institutions, respect for Congress. I say that when Mr. Thomas, seven, eight, or ten days, according to his testimony, before the 26th of March, signed this subpoena and signed it, as he admitted, in blank, and caused the seal of Congress to be affixed to it, there is contempt for Congress. There is contempt for you—contempt for every citizen.

I do not know how many of you recall the very first voice raised—it has been called the first cry—the first shout of the American Revolution, which was raised by Samuel Otis 10 years before the Revolution occurred. And why was it raised, members of the jury? It was raised in protest

against the issuance of writs of assistance in blank. That was the first voice raised demanding freedom for these United States. Writs of assistance were writs given to people who allegedly were looking for smuggled goods, and the deputies who went out with the writs in blank, when they got to the place they wanted, wrote the name in. It was an emergency. That is what the officials of the Crown said. "It was an emergency. We had to do that." Yet the beginnings of the United States were made in protest against this sort of thing. Mr. Thomas will say it was an emergency.

His Honor will tell you that subpoenas did not have to be issued or signed by Mr. Thomas. They could be signed by the chairman of any subcommittee, or they could be signed by any other member, under the direction of or appointed to sign them by Mr. Thomas. If Mr. Thomas was going out of town, there were ways, within the words of that resolution, to take care of that.

But even that falls down. There was no emergency here. Mr. Thomas was right there. He has been part of this arrangement to get this subpoena for a man who is going to testify for 2 hours. There is no emergency there.

Now, you heard something about the manner of service. First of all, let us get something about this name business. I asked Mr. Thomas what name he was born under, not for the purpose of holding that against him, but for the purpose of showing that it is not terribly important. We know some of the most prominent figures in the United States

today by their stage names, their pen names, their names in the prize ring, their names on the baseball diamond. Why, when Robert Taylor was called before them, they never thought of asking him whether that was his name or not. Of course. Now, why did they do it in this case? They say for purposes of identification, and yet Mr. Fihelly said—I think he went outside of the evidence to do it, because there is no evidence of it—that they had a lot of information about it.

I thought, when I was getting a few remarks together, that I would make a lot of the fact that, although this indictment says, "Eugene Dennis, also known as Francis Waldron," and all these resolutions speak of, "Eugene Dennis, also known as Francis Waldron," there is not one scintilla of evidence in this case that Mr. Dennis was ever known by any name such as Francis Waldron or any name other than Eugene Dennis. They were getting testimony from the secretary of the Communist Party, and whether he gave the name Fihelly, McCabe, or Dennis is entirely unimportant.

That was not the reason they had served the subpoena on him. They had the subpoena there to serve him with.

You heard Mr. Stripling—I do not know whether he was one of the investigators or spies that were sent down to that meeting under the auspices of the Southern Conference on Human Welfare—but you heard this chief investigator dramatize the scene in which he served Mr. Dennis. Mr.

Dennis is standing there, stalking proudly with his arms folded, having said, "I hold this committee in contempt."

I say that when he uttered those words, he was not alone in that feeling—the contempt of which he spoke there. Remember this. You have to remember that, considering an indictment charging contempt, the contempt alleged is not at all his saying, "I hold this committee in contempt." That is simply a statement or an expression at that time. The contempt alleged here must be a wilful contempt in appearing on April 9.

To get back, Mr. Stripling dramatized this, trying to make Mr. Dennis pose as what Mr. Fihelly calls a big man. He was certain of this. He laid it on his arms and walked away. Well, he made quite a picture. Here is a man refusing to accept a subpoena, but he can't fool Mr. Stripling. Mr. Stripling, the chief investigator, is on to tricks like that. He walked up and laid it on his arms.

We are very fortunate that some other persons were there. They had a good many people. The Government

shows one. They called a decent, intelligent, young man, who was there for the purpose not of furthering any aims of the committee, but for the purpose of observing accurately so that he could report truthfully to the American press and the readers of the American press just what went on.

What happened? The bubble burst. This grand picture dramatized by Mr. Stripling burst right in his lap, 423 because, far from picturing an arrogant person refusing to accept a subpoena, Mr. Nellor said that as Stripling approached, it became apparent to Mr. Dennis that Stripling had something for him, and he reached out his hand for it. He even recalled that it was his left hand. He had a piece of paper, but he reached out his hand and accepted the subpoena.

Who is telling the truth or who is lying? Either Mr. Nellor, who is a truthful observer, who had no interest in lying to protect the interests of this committee, is lying, or Stripling is lying.

I say Stripling, an investigator for the committee, does not come before you as a disinterested witness. He comes before you in furtherance of his job and his activities as an investigator.

I think I do not have to call attention of members of the jury to that, particularly Government employees—that investigators who are out to find what they want to find are interested witnesses.

What happened after that? April 9. Mr. Dennis was called. He did not appear in person. Did he appear? He appeared by counsel. He had prepared an 11-page typewritten statement.

Is that a wilful default? If you had an appointment with some person and you hear nothing from him, you are probably justified, until you get some explanation, in 424 thinking that he is wilfully ignoring you.

I say it is just the opposite here. It is just the opposite of contempt when a man hires a lawyer, writes out

3,000 words, approximately—it is eleven typewritten pages—and hands it to the committee and says, right in the first line, “I shall not be present before your committee, and here is why.”

And what was his explanation, members of the jury? I assume that you, as fair-minded persons in your individual affairs, refuse to condemn a person without hearing his side of the story. There is one standard of American fair play that ought to be in the hearts of every one of us. We would not blame our youngsters for breaking a lamp in the house, if they did, until we said, “Did you mean to do it? Is it an accident? What about it?”

Would any member of this jury convict or condemn any person under circumstances such as these, where a person had gone to the trouble of saying, “I am not in wilful default, and here is why I am not appearing”?

I ask you again, Why didn't he? You are not allowed to know. Mr. Fihelly fought tooth and nail to keep you from knowing what explanation Mr. Dennis gave to the committee on April 9 for not appearing and I say to you that there is the gravamen of this case. I am not dragging any red herrings across the table. Those exhibits are not 425 red herrings. Those exhibits which Mr. Mundt said, “We should consider.” Mr. Mundt testified on the stand there that he said, after receiving the letter, “Well, now, let us go into executive session and see whether this man has a valid excuse for not coming.”

What would any fair-minded person do? Mr. Mundt's first instinct apparently was, “Let us look this over.”

Supposing that letter, for all you know, continued like this—you got one sentence of it—

“Dear Mr. Committee, I shall not appear before your committee on April 9, because I am in the hospital. I was operated on yesterday for appendicitis. My doctor says I won't be able to get out for three weeks. I am very sorry I can't be there on April 9. If you will fix another day, I will be very glad to come.”

I do not think I am violating any secret, and I do not want to be misunderstood as indicating that the letter said that. Mr. Dennis was not operated on for appendicitis. Sometimes analogies that counsel draw are misunderstood. I am just saying, for all this jury knows, for all Congress knows, for all the grand jury knows, that is what was in the letter.

Does that indicate a wilful default? I say, members of the jury, that that in itself would be enough to create a reasonable doubt in your minds.

How can the jury possibly say what was in this man's mind when they do not know what he said? Mr. 426 Fihelly has argued to you that because he said, on March 26, "I hold this committee in contempt," therefore everything he did thereafter was wilful.

He is not indicted for what he thought or said on March 26. He is indicted because on April 9 he allegedly wilfully defaulted in his appearance. That is certainly the nub of this case.

I will agree with my friend on that—that if you find that a lawful subpoena made up as was testified to here was served on him lawfully, served during a committee hearing, and he thumbed his nose without giving any explanation to the committee, without having any reason for it, then I would say that would be a wilful default.

How can you find that? How can you possibly find that? It is not in the case. You are asked to conclude from the mere circumstances that he failed to appear. You are asked to ignore any explanation that he might have given or did give. You are asked to conclude from those circumstances that his default was wilful.

Well, circumstantial evidence is legitimate evidence. Very often persons have been convicted on circumstantial evidence alone. But the Court will warn you that where conviction is sought on circumstantial evidence, the jury may accept it, but that if there is any other reasonable explanation for the conclusion sought to be drawn or for the act

from which the conclusion is sought to be drawn, then
427 that works for the benefit of the defendant and must
result in an acquittal.

We have here the circumstance of non-appearance, and from that you are asked to conclude that his action was wilful.

I say to you that under all these circumstances it seems absolutely impossible that such a conclusion could be reached.

After that they went into executive session. Whether they considered the letter or not, I do not know. I know when they went to Congress they did not, and you know that a committee of this sort, before a person may be cited for contempt, before the matter may be referred to the United States Attorney for the District of Columbia, must get the consent of Congress, must have a resolution passed.

You will have that resolution before you and you will see—I think it is Exhibit 5—that the House of Representatives apparently thought they had all the information before them. You will see that this committee gave the entire Congress the same treatment as the people they want put on a black list. They did not tell Congress all the facts. They read the first line of the letter, “I will not appear before you.” They did not give any other explanation.

Mr. Mundt said they should see whether it is a valid excuse for not appearing. They did not let Congress in on that.

Here is Exhibit 5. Here is the resolution:

428 “Resolved, That the Speaker of the House of
Representatives certify the report of the Committee on Un-American Activities of the House of Representatives as to the wilful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron”—and I cannot help recalling the unimportance of that; in fact, it was never proved—“to appear before the said Committee on Un-American Activities in response to the

subpoena served on him on March 26, 1947, together with all of the facts in connection therewith."

Now, Mr. Thomas brought a resolution into Congress. As a result of that, Congress certified certain things to the United States Attorney for the District of Columbia, represented here by Mr. Fihelly, and Congress, over the signature of its Clerk, with the seal of Congress on it, said, "Here are all the facts in connection therewith."

Congress was acting honestly in that. They thought they had all the facts. They did not. They did not have the facts. Mr. Thomas was no more fair with them than he has been with anybody else.

As I say, Mr. Marcantonio is placed on trial today. I am very glad that this jury had the chance to compare Mr. Marcantonio's appearance and demeanor on that stand, his decent, straightforward testimony when he was being baited by Mr. Fihelly, and Mr. Fihelly once suggested, "Do not evade my questions," and the witness said, "Evade your questions? Mr. Fihelly, I am not
429 evading any questions." And the attitude of the

United States Attorney, whether he was evading questions or not, would not let him answer any questions; and he had to fight to get in a little bit of testimony which he was allowed to give.

He knows Communists, certainly—some in his district. You people may all know them. You may not realize it. He said he knows a great many other people. He says he knows this defendant in connection with his visits to him in connection with labor legislation and freedom from racial discrimination.

Mr. Fihelly will say I am appealing to certain members of the jury because I am referring to Negroes. It is a wonderful thing, but we are allowed here to have the benefit of a cross-section of our community.

If Dennis is guilty of wilful and deliberate contempt, if you can possibly find that beyond a reasonable doubt, then he should not be acquitted, because he happens to be a

Communist, because he happens to have been interested in civil liberties or racial equality. Of course not. But he should not be convicted because he is interested in racial equality. He should not be convicted because he is a member of the Communist Party.

The Communist Party appears on the ballot in various States. It is no crime to be secretary of the Communist Party. Some of us disagree with them. Mr. Marcantonio said, "I believe in the capitalist system." He disagrees, but he is not ashamed to shake his hand, and, where he thinks he is being the victim of an unjust prosecution, a prosecution which is not warranted and which would not have been brought against him except for the fact of his politics, he is not ashamed to shake his hand. I think any member of this jury in a position like this defendant would be proud to have a man like Marcantonio come over and shake his hand.

I just want to watch my time. I think I started about 10:43.

The Court: 10:42.

Mr. McCabe: 10:42?

The Court: This is the usual time when we take a recess, so we will now take a 5-minute recess. You have eleven more minutes.

(A short recess was had.)

The Court: You may proceed, Mr. McCabe.

Mr. McCabe: Members of the jury, I am not going to go over any more of the testimony. I think that the jury has a right to be impatient when a lawyer rehashes and rehashes the testimony, because, after all, you have listened here for three days—two days, really, that you have been sitting—and it is your recollection which governs this matter.

There was one little matter that I might call to your attention. You might wonder why I did not. After all, I had

Congressman Thomas under cross-examination, and
 431 I asked him when he had prepared the subpoena, and he said four or five or six or maybe ten days before March 26, and a little while later I asked him the same question, and I said, "Mr. Thomas,"—perhaps I had better refer to that, your Honor, because your Honor said that I might, after I had the transcript before me, refresh their recollection.

Does your Honor recall that?

The Court: No, I do not.

Mr. McCabe: It will take only a moment. We are wasting some precious moments with this, but as long as I started, I had better finish.

At page 249 I asked Mr. Thomas:

"When was this subpoena made up, Mr. Thomas?"

"Answer. Probably a few days before Mr. Dennis appeared; maybe five days; seven days; maybe ten days before; and, your Honor, may I explain—"

"The Court: No. You answer the questions. Mr. Fihelly will take the matter up on redirect.

"By Mr. McCabe:

"Question. It was signed by you when?"

"Answer. Maybe five to ten days prior to that date.

"Question. No question that it was signed by you prior to the 26 of March?"

"Answer. There is no doubt about that. It was signed by me prior to that date."

432 Then I went on to show him that the exhibit purported to have been signed on March 26.

Over on page 251, just a short time afterwards:

"And that is the day that an attempt was made to serve Mr. Dennis?"

"Answer. That is correct.

"Question. And you directed Mr. Stripling to prepare a subpoena?"

"Answer. That is correct.

"Question. I thought you said the subpoena was prepared five or six or nine days before."

That is what I just read. He had said five or six or ten days before.

"Answer. No; I signed the subpoena eight or nine days before.

"Mr. McCabe: I would like to ask the reporter to go back. My recollection is quite clear. I asked Mr. Thomas when the subpoena was prepared. He said he was not sure as to the date; five or six or seven before. I asked him if he was quite sure that it was prepared before the date of the meeting.

"The Court: The jury will remember, and you may refresh their recollections when you sum up and get certified copies of the reporter's transcript for that purpose."

I was going into that simply to show another contradiction between Mr. Stripling and Mr. Thomas.

Mr. Thomas testified that the subpoena was prepared five or six or ten days before. Mr. Stripling said it was prepared that morning.

Now, members of the jury, you were examined very carefully on your voir dire. This jury was selected with extreme care, care by the Government and care by the defendant; but sometimes I confess to you a defense attorney does not want too smart a jury.

In this case, above all things, I wanted a jury which would render its verdict according to its head rather than according to its heart. I wanted a jury which would consider the case on its own merits, which would not try the Communist Party, which would not try Marcantonio, which would not even try Mr. Stripling. I wanted a jury which would be unafraid, because I realize that the easiest thing that a jury could do would be to say, "Well, he did not appear. Convict him. We don't know why he did not. We weren't told. Let somebody else tell about that. We are not going back to our places of employment and have somebody look at us and say, 'You must be a Commie

lover. You are the fellow that freed that Commie, aren't you?"

I asked you, on your solemn oaths, whether there was any faint fear in your mind if that would happen and if that would come into your mind when you considered the case, and each one answered, most solemnly, and I
434 am sure most truthfully, that there was no such reservation in your mind.

You heard some of the jurors say, "Yes, I have a prejudice. I have such a prejudice that I can't give them a fair trial."

We respect them for it. We may not respect such prejudices. After all, maybe they are entitled to it. After all, that is one of the American rights—the right to be wrong is one of our most precious rights. Even those rights cannot be taken away from us.

I say you were chosen most solemnly, and now comes the time when you are called upon to live up to the oaths which you took, live up to them without fear that you will be harassed by spies of the House Committee on Un-American Affairs; or that your names will be given to that committee because you conscientiously and honestly, after listening to the argument of Government counsel and the charge of his Honor, felt that there was only one verdict possible—a verdict of not guilty.

Remember, your verdict must be unanimous. That means that each member, of his own intellect, must be convinced beyond a reasonable doubt of every element which is Honor will tell you is necessary to make up guilt in this case.

If any element is advanced by the Government and not proved to you beyond a reasonable doubt, you must ignore that element in considering the guilt of the defendant; and if that is a vital portion of the case which
435 the Government has attempted to prove but has not proved it to you beyond a reasonable doubt, then the case falls. There is nothing more to it. You have nothing to do except to return a verdict of not guilty.

Now, in this case I think we all agree that the most important point, the point on which the Government's case may fall, is the word "wilful." There is no question that the defendant did not appear in person on April 9. We are all agreed upon that.

We say that he appeared by counsel through a letter. My friend says you jurors were summoned to appear here and you appeared. He overlooks the fact, I think, and you must recall, when you were called as jurors, that some jurors did not appear. On every panel there are some jurors who have to send an excuse or who appear and have an excuse, and they are excused.

The first thing we did in starting the trial of this case was to accept an excuse. It appeared to me that the name of a juror was on this panel and he was not here—

The Court: Oh, no; he was here. He had an engagement.

Mr. Fihelly: Certainly.

Mr. McCabe: His excuse was accepted, and he was excused.

I say the same thing applies in this case. Members of the jury, we are entitled to the decision of every one of the 12 members of the jury. That does not mean
436 that if you are in the minority you won't give careful consideration to the arguments of your fellow jurors. It does not mean that you will be stubborn or contumacious. But, after giving full weight and consideration to the argument, you say to yourself, "In a matter of as great importance to me as to this defendant, I would hesitate to act."

The doubt need not be so great as to prevent you from acting, but as to make you hesitate to act. When you are in a position of craving more information, you are not satisfied to act on the information before you, then a reasonable doubt exists, and that doubt must result in the acquittal of the defendant.

I close with this thought: The fact that this defendant did not wilfully default is shown by his engaging an attor-

ney, by writing the letter, a letter which you will never see, a letter which was not presented to Congress, but a letter which, in its very absence, must raise in your mind a reasonable doubt as to whether the act of this defendant in not appearing was wilful or not.

I say to you ladies and gentlemen of the jury, you have got to be courageous. The easy thing to do anybody can do. You were not selected to do that, to take the easy way; you were selected to render a conscientious verdict, free from any passion or prejudice or fear of consequences to you. I say, members of the jury, that verdict can only be a verdict of not guilty.

437 Closing Argument on Behalf of the United States.

Mr. Fihelly: May it please the Court, and you ladies and gentlemen of the jury: Just a few remarks in closing, only commenting on the remarks made by counsel for the defendant.

The Government has the right to open and close in this case, ladies and gentlemen, because we have the burden of proof. The same way in a civil case. If you file a suit, you have the burden of proof. You have the right to open and close.

I am only going to confine my remarks, as I properly should, to remarks made by counsel for the defendant in his argument to you.

One of the last statements he made to you was this: If you ladies and gentlemen, when summoned as jurors, appeared, and there were some others who, for certain reasons, probably for honest and fair reasons, did not appear, that would be all right. But there was no prospective juror who wrote the Court and said, "I will not appear," and that is what this defendant did in this case.

He said the most important thing in the case is the word "wilful," and, as his Honor will instruct you, all that "wilful" means is intentional or deliberate, that it was not accidental and that it was not inadvertent; and the first

438 paragraph of this man's statement, which was read

to Congress, and that is all you needed, was, "I will not appear before your committee on April 9."

What more do you want for being deliberate and intentional?

He says what happened on March 26th is not conclusive proof; that it was the deliberate and intentional nonappearance on April 9. Ah, but coming events cast their shadow before them, and the defendant on that day, when he saw the subpoena, said, "What the hell is that? I hold this committee in contempt," and tossed the subpoena on a table.

With that, and with the letter that he sent or the statement that he sent on April 9, "I shall not appear before your committee," you have an homogenous and a consistent line of thought on the part of this defendant indicating his contempt on the 26th of March and on the 9th of April for this committee of the House of Representatives of the United States of America.

Now, as Mr. Mundt said in his testimony—and counsel has mentioned a lawyer appeared for him on the 9th—there is one thing this defendant likes, and that is lawyers. He has apparently read the whole list when he comes in here, when he says that in a multitude of counsel is there safety.

He had a lawyer there on April 9, but, as Mr. Mundt said, "We did not want the testimony of Mr. Lapidus. We
439 wanted and were entitled to the testimony of this defendant, Eugene Dennis."

His counsel has said, suppose he were sick or being operated on? Then he said, no, that was not the fact. He was not operated on on that particular day. No. Dennis was operating on the Committee on Un-American Activities on that date and part of the Government of the United States, and by your verdict you shall tell him whether he can get away with that or whether others can get away with it or whether the law that was passed with respect to a wilful default shall be enforced in the District of Columbia where a person has been properly subpoenaed.

He talks about the subpoena having been prepared by Mr. Thomas a few days before, when he signed it in blank.

Later on Thomas said, "No; I just signed my name and filled it in later."

That is splitting hairs, grasping at straws.

Look at the real crowbars of evidence that you have in this case. Counsel said ~~that~~ there are a million individuals whose names are in these card indices. If so, that is a rather alarming situation, and undoubtedly warranted the steps which the President of the United States took with respect to a loyalty order. It also undoubtedly shows the work which this committee has been doing; and, as the witness, Mr. Thomas, told you on the stand, those files
440 or those card indices are open only to the Government and to Members of Congress.

Counsel said, and this is a most fallacious argument, this: Why, think of it; one out of every one hundred fifty individuals in the United States has his name in these card indices. Here is where the fallacious argument comes. And that means that one out of one hundred fifty of your friends, if each and every one of you has one hundred fifty friends, and that would probably mean one of your co-workers in the Government or where you work, is a Communist.

That is not a logical argument. Yes, that would go for Marcantonio, but he means you ladies and gentlemen of the jury when he says that—one out of one hundred fifty of your friends is a Communist. I will wager that none of you on the jury knows, other than by hearsay, any individual who is a Communist; and it is insulting to make that analogy and that comparison to you jurors and of you jurors.

Counsel says there are no judicial standards set up by this committee. Again, he is not meeting the issues in the case; getting off on a tangent, off the beam.

You members of the jury heard the law that set the committee up. There was nothing in that law about having a judicial standard as to what was Un-American and subversive. You have individuals with common sense on that committee, and Congress knew that its members, whoever they

put on that committee, would know what was un-
 441 American and what was subversive. There is no calling the statute for a judicial standard.

Mr. Thomas said, "I know what un-American and subversive is. I can't talk for the other members, but I think they know, too."

You well know that they know, and a child would know that the action of this defendant in this case was un-American and subversive. You would not need any judicial standard for that, because the statute says that it was a violation of the law.

Counsel makes this brazen statement, and I am amazed and surprised that he made it. "The defendant's nonappearance on April 9 was justified."

How an officer of the law, an attorney, an officer of the court, who was admitted by His Honor for the purposes of this trial, could get up before you members of the jury and say that the defendant was justified in flaunting the law, I do not know, and I do not think he realized what he said, and could not have meant it, because that is not the work of lawyers, and I am sure that counsel, on afterthought, will realize that he should not have said it and did not, down in his heart, mean what he said.

Counsel says you holler when you are hurt. Yes, you do, and you also holler when the Constitution is being hurt and threatened. That is the only hollering we have done in this case. We have not been hurt. We have not been
 442 pulling any punches, but we look on it, as you members of the jury, as a most important case, and your verdict should be a warning that there should be no more of it in this District.

Counsel said they lured this poor defendant into a trap. They could have placed a subpoena on him up in New York and brought him down. These arguments are just will-o'-the-wisp. There is no logic in them. They are not in the issues. He asked to come down, and they did not have to pay his expenses. They served a subpoena on him there,

but they could have put a subpoena on him in New York and brought him down. Of course, he may not have come down, but, as far as the efficacy of that subpoena is concerned, that subpoena can be served anywhere in the United States, just as a subpoena in one of the Federal courts can be served.

Counsel says, "Why did they want that man when he came down for 2 hours?" He had a prepared statement that he wanted to read for 2 hours, but he was not going to tell the committee the facts that he knew about, and he was not going to put on the record what their investigation had uncovered, and that was shown by the very first question, when they asked his name.

Now, with respect to the name, counsel says there has been no indication in the case and no proof that the defendant was known as other than Eugene Dennis. He pleaded guilty under the name Eugene Dennis, otherwise known as Francis Waldron. He forgot that.

443 He speaks of Samuel Otis and the writs of assistance being written out in blank. He might as well talk about Otis Elevator Company. It has nothing to do with the case.

Counsel mentions that a number of athletes, fighters, and so forth use various names. If any of those individuals were called before the court or the committee, they would not hesitate about telling their names. This man did. The man who wanted to talk for 2 hours would not talk for 2 minutes. He showed his contempt then, as he did later, for the House Committee on Un-American Activities.

Counsel makes this statement, which is an improper one, appealing to the emotions and neither to the head nor to the heart, that he has spoken of. He said this defendant is not alone when he held the Committee on Un-American Activities in contempt. That is also a most unusual and inordinate statement to be made by a lawyer and an officer of the court—admitting the guilt of the defendant; saying, yes, he held the committee in contempt, and so did others.

By your verdict you can show this defendant and any others who hold a similar thought with respect to the law and with respect to the subpoena that they can't get away with it.

Now, he says that Nellor said that the defendant was served one way and Stripling said another. Forget that. That is not meeting the issues. The main thing is that both witnesses say the man was served. Again off
444 the beam, not meeting the issues. He said we fortunately have Mr. Nellor. He did not mention that the defendant did not call any of the newspaper men in there.

We even mentioned that they had a sound reel if they wanted it. We had the stenographic report if they wanted it.

Counsel says Congress was not told all the facts when Mr. Mundt stated what he did. He stated all that was necessary. The statute says, as His Honor will tell you, whoever, having been lawfully summoned to appear before a committee of Congress, wilfully makes default, shall be guilty. That is all that was necessary.

You can imagine what was in the eleven-page tirade which His Honor ruled out. The fact that a man puts in a statement, the fact that he sends a lawyer down to give that statement to Congress—that still does not get away from the statute and the wilful default. The first line of that was all that was necessary. He signed his own ticket. He signed his own guilt when he said, "I shall not appear before your committee on April 9." That is all that was necessary.

He speaks about Mr. Marcantonio's straightforward testimony. Well, a corkscrew is straight compared with Marcantonio. He was asked if he knew any Communists.

He said, "I know Mr. Dennis."

Finally, after a few more questions, he knew 25 Communists.

If you call that straightforward testimony, that is
 445 not my idea of it. I use a different kind of level when
 I am looking for something straightforward.

Ladies and gentlemen, I have answered briefly the remarks made by counsel. I know it has been difficult for counsel, and the three of them have done the best they could. If there were 33 counsel here, they could not have done any better to get the defendant out of the legal mess that he got himself into. It is the old story of Humpty Dumpty having a great fall and all the King's horses and all the King's men couldn't get him together again.

If you had 33 lawyers here, they couldn't legally get this man out of the mess that he has voluntarily and deliberately got himself in.

On this evidence, and on the law as His Honor will give it to you, I ask you for a verdict which will be one sustaining law and order in this District insofar as the service and the respect for a subpoena is concerned. Congress cannot legislate unless they can investigate. If any individual can hold himself up as greater than the Congress of the United States, then, as I say, God help Congress and God help our Government; and I know by your verdict you will say that this defendant or no one else can do so and get away with it.

446

Charge to the Jury.

The Court (Pine, J.): Members of the jury, the taking of testimony in this case has been completed and the summations of counsel have been concluded, and the time has now come for me to charge the jury, which simply means that the time has now come for me to give you those principles of law which are to guide you and govern you in your deliberations and in the determination of your verdict.

Under our system of jurisprudence, when a case is tried before a jury, the court consists of the Judge and the jury. Each has a separate function and responsibility, and neither may trespass upon the function and responsibility of the other.

The Duty of the Judge is to preside at the trial, pass on questions of law as they arise during the trial, including questions of the admissibility of evidence, and, finally, at this stage, to give you the law which is to guide you and govern you, whether you agree with it or not.

The function and responsibility of the jury is to find the facts, and that is their exclusive function and responsibility. In finding the facts, the jury is limited to the evidence and inferences reasonably and logically deducible from the evidence.

The evidence in this case consists of the testimony of witnesses who have appeared before you and documents which the Court has allowed to be received in evidence and
447 which have been read to you and seen by you. You may not guess or speculate; you may not conjecture.

In determining the facts, you are necessarily obliged to determine the credibility of the witnesses who have appeared before you—that is to say, the amount of credit which you will give to the testimony of the witnesses who have appeared before you—when you come to weigh and judge and evaluate their testimony; and in determining credibility, you have a right to take into consideration the conduct and manner and demeanor of the witnesses as they testified.

You may take into consideration whether the witnesses gave their testimony frankly and candidly or otherwise. You may take into consideration the memory or lack of memory of each witness as disclosed to you by this testimony. You may take into consideration any interest which a witness has in the outcome of the case, which may have colored or perverted his testimony. You may take into consideration any bias or prejudice which any witness displayed, which may have colored or perverted his testimony. And, finally, you may take into consideration all other factors which experienced and reasonable people take into consideration when they come to judge the difference between truth and untruth, or truth and half truth.

I may comment on the evidence as I go along, but if I do it is for the purpose solely of assisting you in understanding the issues which are involved in this case, and not for the purposes of influencing your judgment as to the facts, which, as I have stated to you, is your exclusive prerogative and function.

The summations of counsel are entitled to your careful consideration so far as you find them logical and reasonable, but you are to consider the fact that they are by advocates of their respective sides, and neither what I may say nor what they may say constitutes evidence. As I stated to you before, the evidence is what you heard from the witness stand from witnesses and the documents which have been received in evidence.

There have been numerous objections made by counsel on both sides. It was not only the right but the duty of counsel to object when they conscientiously believed that the testimony was inadmissible, and you should draw no unfavorable inference because of objections nor because of rulings on objections by me.

You should not let sympathy or prejudice enter into your deliberations or enter into your verdict. Bear in mind that you are a fact-finding body and it is your duty to determine the facts uninfluenced by passion or prejudice or any other emotion.

Now, the fact that the defendant is a Communist should not prejudice you for or against him. He is entitled to the same calm, fair, impartial trial as any other person, irrespective of his political or economic beliefs or philosophic views. Neither is he on trial for being a Communist. Nor is he on trial for what he did in March. I think it was March 27. Neither is the Committee on Un-American Activities on trial for any act on their part. Nor does the attitude of the committee or any member of the committee or any Member of Congress toward the political or economic beliefs of others or toward any person or association enter into this case. Nor does any racial prejudice of any Member of Congress enter into this case. The issues

are very narrow, and I shall explain them to you before I am through, but I thought I should at this time tell you what does not enter into this case.

Now, the defendant comes before you clothed with the presumption of innocence, as all defendants do in criminal cases in this country. This presumption of innocence abides with the defendant throughout the trial, until it has been overcome by evidence which convinces you of his guilt beyond a reasonable doubt.

The burden of proof is upon the Government to establish beyond a reasonable doubt each and every one of the essential elements of the offense charged.

A reasonable doubt is such a doubt as would create in a juror's mind, after careful and candid and impartial consideration and a comparison of all the evidence, such a
450 doubt as to make him so undecided that he cannot say that he has an abiding conviction of the defendant's guilt. Stated another way, it is such a doubt as would cause a reasonable or prudent man to hesitate or pause in the graver or more important transactions of life. However, it is not a whimsical doubt, nor a fanciful doubt, nor a doubt based on groundless conjecture. It is a doubt, as the name implies, which is based on reason, a doubt for which you can give a reason, after a consideration of all the evidence or lack of evidence. It does not mean that the Government is required to establish the defendant's guilt to a mathematical certainty. The burden of proof on the Government is simply to establish him guilty beyond a reasonable doubt, as I have explained that term to you.

In this case the defendant has not taken the witness stand. His failure to take the stand and testify in his own behalf does not create any presumption against him, and you must not permit that fact to weigh in the slightest degree against him; nor should it enter into the discussions or deliberations of the jury in any manner.

In this case the defendant is on trial charged with an offense known in the law as contempt of the House of Rep-

representatives of the United States. The specific charge against him is that, having been summoned and served as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to
 451 appear and give testimony before this committee at its session in the District of Columbia on April 9, 1947, on matters committed to this committee by the statute and resolution which have been brought to your attention during the trial, and knowing that he was summoned and served, he wilfully failed to appear and thereby made wilful default.

Congress has the power to conduct investigations in order to secure information needed by Congress in connection with the enactment of legislation. Such investigation may be conducted through committees.

Now, pursuant to Public Law 601, enacted at the last session of Congress, specifically approved August 2, 1946, and the House Resolution No. 5, which was read to you after having been received in evidence, Congress created this Committee on Un-American Activities. The specific language is as follows:

"There shall be elected by the House, at the commencement of each Congress, the following standing committees:"

A number are mentioned. Finally:

"17. Committee on Un-American Activities, to consist of nine Members."

Then it says this about it:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects
 452 of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and

attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

The defendant has requested certain instructions on the law which I have granted, and which I shall now read to you. They state the law in respect of the matters therein dealt with.

453 Instruction No. 19 reads as follows:

"In order to find the defendant guilty of an offense, you must find that he not only failed to attend at the session of the committee in question, but that he wilfully failed to attend. You cannot conclude that he wilfully failed to attend simply by his not appearing."

I will now read to you Instruction No. 24 of the defendant:

"The words 'any matter under inquiry' as they appear in the statute refer to matters within the jurisdiction of the House of Representatives and the committee before them for consideration and proper for their action. Unless you find beyond a reasonable doubt that the defendant was lawfully summoned to give testimony in a matter under inquiry

by the committee, as the Court has defined those words, you must return a verdict of acquittal."

Now, so far as the definition of those words is concerned, it is this: A matter under inquiry is any one of the matters set forth under the Public Law which I just read to you in respect of which the committee was authorized to make investigation.

In weighing the evidence, if the acts and conduct of the defendant are just as consistent with innocence as with guilt, then he is entitled to the benefit of the presumption of innocence. If you can reconcile the evidence in this
454 case with any reasonable hypothesis consistent with innocence, it is your duty to do so.

Now, this prosecution was instituted pursuant to a statute known as Section 192, Title II, of the United States Code. The provisions of that statute, so far as they are material, are short and simple. They read as follows, so far as material:

"Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House of Congress or any committee of either House of Congress, wilfully makes default, shall be guilty of a misdemeanor."

Therefore, the elements of the offense charged against this defendant are as follows:

First, that the chairman of the committee, Mr. Thomas, caused to be prepared a summons or subpoena directing the defendant to appear and give testimony before this committee at its chambers in the District of Columbia on April 9, 1947, on a matter under inquiry committed to the committee by the Public Law and resolution which I have referred to and which I have read, so far as the Public Law is concerned. The resolution has been previously read to you by counsel.

Second, that the chairman signed that subpoena or summons and caused the seal of the House of Representatives

to be affixed thereto, and that the seal was attested by
455 the Clerk of the House of Representatives.

Third, that the chairman designated Robert Strip-
ling to serve that summons or subpoena, and that thereupon
Robert Stripling did serve the summons or subpoena by
placing it in the possession of the defendant.

Fourth, that the defendant thereafter made default in
that, knowing that he had been served, he failed to appear
and give testimony before the committee at the place and
at the time mentioned in the summons or subpoena.

And, fifth and last, that such default or failure was wilful
on the defendant's part.

By "wilful" is meant that his default or failure was
intentional and deliberate and not inadvertent nor acci-
dental. The word "wilful" does not mean that the default
or failure must necessarily be for an evil or bad purpose or
in bad faith. The reason or the purpose of the default is
immaterial if it was deliberate and intentional and was not
mere inadvertence or accident.

If you find that the Government has established each and
every one of those five essential elements beyond a reason-
able doubt, your verdict will be guilty.

If you believe the defendant to be innocent or that the
Government has not established each and every one of those
five essential elements beyond a reasonable doubt,
456 your verdict will be not guilty.

Therefore, you have only the two verdicts: Guilty
or not guilty.

Now, when you go to your jury room you will take with
you the indictment. Bear in mind that the indictment is
not evidence. It is simply a statement of what the defen-
dant is charged with, a statement which puts him on notice
that he is charged and what he is charged with, and a state-
ment that you may look at to see what he is charged with.

When you go there you will first elect a foreman, and he
will preside over your deliberations.

Your verdict must be unanimous. When you have reached
it, you will make the fact that you have reached a verdict

known to the deputy marshal in whose custody you will be. That fact will be communicated to the Court and to counsel, and then your verdict will be received.

It will be given by the foreman, unless the jury is polled. In that event, each of you will be required to announce your verdict.

If you gentlemen have any further suggestions or exceptions, you will come to the bench and make them.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. McCabe: I have two.

The Court: State your exceptions.

457 Mr. McCabe: I except to that definition of wilful default which is set forth in No. 5 in your Honor's definition of the elements constituting the offense.

I except to the charge—I think it was in 5—that bad faith is not necessary and that the reason or purpose is immaterial.

The Court: Well, that is a reiteration of the position you have taken previously, and you wanted to make your record clear; is that correct?

Mr. McCabe: That is correct, your Honor.

The Court: Do you have any objections or suggestions, Mr. Fihelly?

Mr. Fihelly: No, sir.

The Court: All right.

(Counsel resumed their places at the trial table, and the following occurred:)

The Court: Members of the jury, you may take the case and proceed to deliberate.

The alternate jurors will remain seated.

(The jury retired to consider its verdict, at 12:15 p. m.)

The Court: I want to say to the two alternates that their duty and function has been fulfilled, and I want to express my appreciation to you for listening so attentively. It might have been that you would have been called to serve if some juror became disqualified. That event did not

458 transpire, and now you are excused, with the thanks of the Court.

The Deputy Clerk: You are excused until Monday morning in Judge Keech's court. Monday morning at the usual time.

The Court: We will recess until the return of the jury or until 1:30.

Mr. Fihelly: May we go to lunch, your Honor?

The Court: I should think so.

Mr. Fihelly: That is what I thought. I wanted to get your Honor's permission.

The Court: I think you had better wait until 1 o'clock. If they do not reach a verdict by 1:00, then I will send them to lunch. Is that convenient to everybody?

Mr. Fihelly: That is satisfactory. I just wanted to know what Your Honor desired.

(Thereupon, at 12:17 p. m., a recess was taken.)

(At 4:35 p. m., court was reconvened and the following occurred:)

The Court: The jury is out something over 4 hours except for the time they took for lunch, and I thought I would call them in to inquire whether there were any questions of law on which they wished further instructions, and, if they said there were, to give them instructions; if they said there were not, to give them the Allen charge.

Mr. McCabe: If the Court please, I would object to any question by your Honor of the jury as to whether
459 or not they wish further instruction on the law, after your Honor has completely instructed them, in the absence of any suggestion or request by the jury to that effect. I think it should come from them, and, in the absence of any request, I would object to Your Honor's volunteering that.

The Court: Would you object also to the Allen charge?

Mr. McCabe: No, sir. I do not think I have any reason to object to it, although I do not agree with the phraseology of it. After all, it has been upheld, and I think a sufficient

length of time has gone in a matter in which the facts are relatively simple to cause your Honor to feel that such a charge is appropriate at this time.

The Court: Well, then, I will just give them the Allen charge and be done with it.

What do you think of that, Mr. Fihelly?

Mr. Fihelly: I will have no objection, your Honor.

The Court: All right. Bring the jury in.

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Additional Charge to the Jury.

The Court: Members of the jury, you have been out something over 4 hours now, except for the time consumed for lunch, and I wish to give you one further instruction, which has the approval of the Supreme Court, and it is as follows:

The jury are instructed that in a large proportion of cases absolute certainty cannot be expected; that, 460 although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet they should examine the questions submitted with candor and with a proper regard and deference to the opinions of each other; that it is their duty to decide the case, if they can conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent, with himself.

If, upon the other hand, the majority are for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which is not concurred in by the majority.

At the end of the Allen instruction I notice that it speaks of men. It was approved at a time when only men served

on juries. Of course, it is equally applicable to women now that women serve on juries.

With that additional instruction, you will now retire and continue your deliberations.

(At 4:39 p. m. the jury retired to consider its verdict.)

(At 6 p. m. the Court convened and the following occurred:)

The Court: Bring the jury in, please, Mr. Marshal.

I wish to warn the spectators to make no outburst
461 in court.

(At 6:01 p. m. the jury entered the courtroom, and the following occurred:)

Verdict.

The Deputy Clerk: Madam Forewoman, has the jury agreed on a verdict?

The Forewoman: We have.

The Deputy Clerk: Do you find this defendant guilty or not guilty?

The Forewoman: Guilty.

The Deputy Clerk: Members of the jury, your forewoman says that you find this defendant guilty. Is this your verdict, so say you each and all?

(The jury indicated in the affirmative.)

Mr. McCabe: If the Court please, I ask that the jury be polled.

The Court: Very well. Poll the jury, Mr. Clerk.

The Deputy Clerk: The jurors will state their verdicts as their names are called. Harold W. Mackall.

Mr. Mackall: Guilty.

The Deputy Clerk: Paul B. Burke.

Mr. Burke: Guilty.

The Deputy Clerk: William O. Howard.

Mr. Howard: Guilty.

The Deputy Clerk: Mrs. Elizabeth L. Holford.

Mrs. Holford: Guilty.

462 The Deputy Clerk: James L. Lineberger.

Mr. Lineberger: Guilty.

The Deputy Clerk: Frank E. Jones.

Mr. Jones: Guilty.

The Deputy Clerk: Mrs. Elizabeth M. Gingrich.

Mrs. Gingrich: Guilty.

The Deputy Clerk: Stanley D. Grant.

Mr. Grant: Guilty.

Mr. McCabe: I did not hear that, Your Honor.

Mr. Grant: Guilty.

The Deputy Clerk: Mrs. Amanda E. Grigsby.

Mrs. Grigsby: Guilty.

The Deputy Clerk: Fred E. Neff.

Mr. Neff: Guilty.

The Deputy Clerk: Percy Parham.

Mr. Parham: Guilty.

The Deputy Clerk: Arthur Hirsh.

Mr. Hirsh: Guilty.

The Court: Very well, Mr. Clerk. You will excuse the jury and give them instructions as to tomorrow, if they are required, or the next day.

The Deputy Clerk: The jury are excused until Monday in Justice Keech's courtroom. Monday morning at the regular time.

(The jury left the courtroom.)

Discussion on Bail.

Mr. Fihelly: Now, in view of what has happened
463 in other cases, I do not think the Government is in any position to ask commitment unless your Honor follows that practice. I know in the Eisler case he was let out on bond, but I do think if he is let out on bond that the bond should be increased. He is now on \$3,000 bond.

We received this information from the Department of Justice today (indicating), which we only got today, that in 1930, while there were charges pending against the defendant in California, he left the country, went to South Africa, and went to Russia. Here is the communication which we have received from the Department in that con-

nection. In view of that, we would ask a \$10,000 bond, your Honor.

(A document was handed to the Court.)

The Court: Well, it is my custom to commit except in very unusual circumstances. The Supreme Court requires me to place a defendant on bail, pending appeal, when there is a substantial question. There is a substantial question here. If I made any error as to my construction of the word "wilful," the defendant will be entitled to a new trial. I think that presents the unusual circumstance which will justify me in this case in permitting the defendant to remain on bail, particularly as the District Attorney has indicated his acquiescence—in fact, has made the motion for that purpose.

Mr. Fihelly: In view of what happened in the Eisler case, your Honor.

464 The Court: In view of what happened in the Eisler case. I will, therefore, grant the motion, but I will also hear counsel as to whether or not the bail should not be increased, as suggested by the District Attorney.

Mr. McCabe: Well, I think \$3,000 bail is substantial bail and has produced the appearance of the defendant. I think that while the amount might be increased, say, to \$5,000, the amount of \$10,000 would place some hardship on the defendant.

I would also suggest to your Honor that, inasmuch as the hour is late, and that it would probably be impossible to enter bail before this Court this evening, that Your Honor would at least continue the bail in the sum of \$3,000 until a day fixed by your Honor for entering bail, say, in the sum of \$5,000 or some other sum, either here or in New York, where the original bail was entered.

The Court: Numerous bondsmen are within stone's throw of this courthouse.

Mr. McCabe: Yes, but it may be a question of expense, your Honor.

The Court: In view of this statement shown to me by the District Attorney, I feel I am going as far as I should go and will enlarge the bail, pending motion for a new trial, and I shall do so only because the District Attorney has suggested it, and I shall set bail of \$10,000.

You will be committed until that bail is furnished.

465 Mr. McCabe: And that could not be postponed until tomorrow, your Honor?

The Court: No.

Mr. McCabe: May I ask whether a clerk before whom bail can be entered this evening is available?

The Court: There are provisions for that, Mr. McCabe. You can take that up with Mr. Fihelly. I am sure he will look after that.

Mr. McCabe: Thank you, your Honor.

The Court: He will explain the mechanics of it to you. You are not familiar with our practice here.

Mr. McCabe: No.

Did your Honor have any date in mind for hearing argument in support of a motion for a new trial?

The Court: I will hear it as early as you wish. Next week sometime?

Mr. McCabe: Say a week from today?

The Court: You can take the maximum permitted by the rules or you can file it forthwith, and it will be set down as soon as the District Attorney files his opposition.

Mr. McCabe: Suppose we let it go without fixing it, and I will see what our commitments are, Your Honor.

The Court: Yes. I will be here all next week and the week after it, and I will make my engagements suit yours,
466 because you are from out of town.

Mr. McCabe: Thank you, your Honor, and we will communicate with Mr. Fihelly and with your Honor the early part of next week.

(Thereupon, at 6:07 p.m., the instant hearing was concluded.)

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The Deputy Clerk of Court: United States v. Eugene Dennis.

The Court: How long will this take?

Mr. McCabe: I do not think it is going to take over twenty or twenty five minutes, your Honor. I certainly do not intend to rehash a lot of evidence.

The Court: You will be through before the usual lunch time?

Mr. McCabe: I believe so.

The Court: I am going to excuse counsel in the matter after this case to two o'clock. That will then afford you an opportunity to do other things. That means Mr. Ryan.

Mr. McCabe: Now, if your Honor please, the Court knows this is a motion for a new trial and arrest of judgment in the case of the United States v. Eugene Dennis after a verdict of guilty.

There are on file some 22 reasons in support of the motion for a new trial, and I think several of them can be combined and several of them can be disposed of with reference to this argument. I do not propose, unless your Honor desires it, to waste your time to labor the argument that was made in favor of dismissal of the indictment on the ground of lack of legislative purpose of this Committee, or lack of constitutional status in the Committee. That has been pointed out and argued, has been digested and overruled,

469 and unless your Honor thinks there would be a possibility of convincing you now, since I have nothing relatively new to add on that score, I would simply rest on the briefs already filed on those points.

The Court: Very well.

Mr. McCabe: I would like to add, however, that the trial of the case, and the testimony developed at the trial of the case, so far from weakening the argument against any legislative or constitutional abuse on the part of this Committee, strengthened our argument very greatly. I think the testimony of the witness Thomas and, to a lesser extent, of

the witness Mundt, but let us say practically entirely the testimony of the witness Thomas showed that this Committee could not, under its own approach to the situation, have a valid legislative purpose, and I base that to a great extent upon the testimony of the witness Thomas, or the witness Thomas' statement that the Committee, which is supposed to investigate un-American propaganda, and subversive propaganda, had no test of what is un-American or what is subversive.

The witness Thomas said, as I recall, that the Committee had an idea of what it was, that he had his own idea, but that he was not responsible for the ideas of others. Now, if we have a committee of seven persons, each one driving in a different direction, certainly that committee demonstrates, by its lack of any cohesive approach to their problem, the very weakness of it, and the utter impossibility of future legislating, if under the Constitution they can legis-

470 late into law anything regarding propaganda. I think it is utterly impossible to legislate without a guide set down by the Courts or by Congress, and I think it obvious Congress hasn't set down a guide, and certainly the Courts haven't, as the witness very frankly replied.

Now, un-American in the eyes of this Committee as Representative Rankin sees it, is, or might be, a very different thing in the eyes of Mr. Mundt, or other members of the Committee. I speak of Mr. Rankin because he was very frank in going on record as to his concept of the American status of freedom of speech, and I think Mr. Thomas' concept of freedom of any committee, or organization, which was denied freedom of speech, would be un-American, and it is, of course, my idea that his Committee has done, and is doing, that very thing; so I just point that out, saying that our argument is strengthened by the actions of the Committee in admittedly saying that they have formulated this line which he has made, and for no other purpose, than to act as a blacklist as to persons on that list, persons connected with government, presumably for the purpose of

weeding out those employees, and persons on that list do not know that they are on the list. That seems to me un-American propaganda of the very worst sort, which strikes at the roots of our idea of fair play when a person is entitled to know of any charges made against him, as announced by the Supreme Court, so we say in line with all the decisions of the courts that, although having
 471 reluctantly approached a declaration of what was unconstitutional, they will not shrink from it at all, and they have no other course but to declare these acts unconstitutional, and I believe at the very outset of the case, and certainly at the conclusion of the case, this Court should have upheld our contentions along those lines.

Now, we will run through these briefly, and as to the first reason, denying the defendant's motion for a continuance of the case, 1 and 2, are matters in your Honor's discretion. I think Your Honor's discretion should have been exercised another way. I say in this Court it was a remarkable thing that any jurors were found to try to hold out against a verdict of guilty where a Communist was on trial. I think it was asking a great deal of human nature due to the fact that several members of the jury at any rate did feel, after consideration of the case, after Your Honor's charge, that a verdict of not guilty was warranted, that there had been no willful default. I think it is a remarkable demonstration of the ability of one or two jurors to think for themselves, but it also points out, I think, the strength of our argument that it was asking too much of the 12 jurors that they should have the same staunch fidelity to their own thought and to their reactions of the whole case.

I have already adverted to No. 3.

Now, No. 4: Again I think under the present system where men are being dismissed from their employment because they attended an anti-Franco meeting—I never heard of anyone being dismissed because he attended a pro-Franco meeting—but at a time when government employees are being dismissed for things of that sort,
 472

when it is the most common kind of gossip for every employee to talk about the various ridiculous things used in the formal discharge of government employees, I think to ask nine government employees to give a fair consideration of this case, even though when they took the oath, let's say they were not convinced they could not approach the case with a fair mind, but having in the back of their mind the fear of losing their jobs, and they took the oath—some were frank enough to say they couldn't do it and others that they could—but after four days in Court, after hearing Mr. Fihelley's philosophy that the Government be spared, could anyone maintain that philosophy successfully, I think it must have been indicated there, and that is what I think, that it was impossible to get a fair trial in a case of this sort where government employees were on the jury.

Now, we go to point No. 5. It refers to the fact that some of the jury heard some of the argument in the case before Judge Keech and, although some matters there were conducted at side-Bar, it is hard to tell how much the jury heard, but I think if the jury had been interrogated in line with our questions, whether they had heard discussed this
 473 case—true, they had not heard this case discussed, but they had heard the argument raised in this case, and frankness would have forced them to say, "We heard argument in Judge Keech's court," and they might have followed it up by saying, "We didn't understand the argument, and it wouldn't interfere with our decision in this case," but it seems to indicate that they were somewhat less than frank than they should have been at the voir dire.

Now, No. 6, Your Honor's ruling on the question of willfulness: I don't know that your Honor has had any change of heart on that item. I think that our memorandum of law which was submitted, and to which I invite your Honor's attention at this time, that it very clearly shows that the question of willfulness was one for the jury, and that the jury could look into the question as congressmen would be supposed to do, as to whether non-appearance was a

valid excuse. Your Honor put the question to me by saying that if people can, by advancing an excuse, be absolved of willful default—then how could Congress carry on its affairs. I say that that case would not arise, or would very seldom arise.

In a case where there is a question of the validity of the subpoena, or right of a committee to subpoena a person, it should be tested, not be judged by that committee, but should be tested out in court without the possibility of sanction of a jail sentence. A still more valid reply, I
474 think, would be that it is up to Congress to change the law. We are administering the law here, and Congress must have meant doing something when they said "willful default." Had they meant what your Honor held that it meant "deliberate," and not necessarily inadvertent, they would simply have said, "any one who defaults in his appearance," as they have said with regard to a good many other criminal statutes. Now, if a finding of "willful" means what a good many cases have said it means, Congress failed on its administrative purpose, or legislative purpose, and has been bogged down by that then they could have very properly changed the law. We are frequently met with that, "If you don't like the law it is up to Congress to change it," and I think Government should be met with that same argument in this case.

Now, No. 8, of course, refers to admission of the subpoenas and the return of Mr. Stripling, and goes back to our argument, and I will just mention it, without dwelling on it, to show that the subpoena was illegal because served at a meeting of the Committee of Congress where a witness had the same protection a congressman has against the service of any process which might eventually lead to his having been imprisoned for violation, and also the fact that no witness fee was tendered. Although it might be a shame to have a case of such importance as this go off on a technical matter such as that, still I wish to urge it as a rea-
475 son for a new trial and in support of the motion for judgment of acquittal even at this time.

Now, then, No. 10 goes back to our argument on the constitutional status of the Committee. That is the matter in which your Honor refused to allow me to propound questions to Thomas, although, as I asked to demonstrate to the jury, that the Committee not only did not know what un-Americanism meant, but that their own idea of what was un-American was distinctly opposite from the meaning of Americanism by House congressmen, and that their idea of what was good Americanism was distinct and contrary to, and a subordination of the Bill of Rights in the Constitution of this country. I think I had a right to show the jury that. Of course, your Honor was entirely consistent in your ruling, but I still press it. That, of course, goes to the testimony of the witness Stripling regarding the service of the subpoena, and

No. 12, relating to the testimony of the witness Nellor related only to the fact that the subpoena was served, and that goes down to No. 14, also.

Now, our 15th reason, of course, is based on all of the reasons advanced theretofore; based on the ground that there was no evidence that the Committee had a right to serve a subpoena; that they did not subpoena properly, at a proper time, in a proper manner for a proper purpose, and that therefore all testimony relating to that should have been stricken out.

476 Now, then, we proposed to prove, and I want to go over with Your Honor the fact of the strategic matters of our offer of proof and point out that in the Townsend case the Supreme Court said one reason they were rejecting Townsend's argument on the lack of constitutional status of the committee before which he appeared was that he did not prove it, he had not offered any proof in support of that. In order to meet that objection we offered proof that we proposed to trace the history of this Committee from its inception down to its being set up as a standing committee, its actions subsequent to that, right up to the objections raised that this standing committee could not be

charged with those crimes as any standing committee, but we were not allowed to do that. I think we should have been allowed to expose this committee before the jury as to its wicked purpose in its attempt to throttle free speech. We proposed to point out through the witness and follow it up with an argument that the whole theory and trend of the present danger relates to actions and not to thoughts, that no one can be imprisoned for thinking, it isn't wrong for a person to think that even assassinations is the proper approach to a situation. I know a very respectable minister in Philadelphia who believes that the only solution to the problem is assassination of practically all members of Congress and many members of government. I say that man has committed no crime by coming to that conclusion; he

hasn't carried it into effect, and wouldn't urge, perhaps, that anyone carry it into effect, but by that thought he has committed no crime, any more than the Communist Party would, if, as some people have charged it advocated the overthrow of the government by force and violence. I think a good many people actually, not only Communists but a good many people believe that the only solution is the overthrow by force and violence of the government, but commit no crime in thinking it; but, going from that, I proposed to show that this Committee sought to control not thoughts of that sort, but that it related to grosser violations, that it related to the nationalization of electricity, or railroads, of banks, that is what this Committee was effecting, and I proposed to show that they were attempting it, not having any valid design or purpose but just out of wickedness, and I think we were prepared to show that they were not doing it for any purpose alleged to be connected with the constitutional status which they assumed.

Now, as to argument on points of the charge I think I have nothing to urge in addition to that which I urged at the Bar of the Court, and there again I say it goes back largely to the definition of willfulness.

Now, as to the motion for arrest of judgment that, of course, under Rule 34, must be addressed to the points we charged on defense to the jurisdiction of the Court, and I submit that the indictment, while under some of the
 478 cases it might be upheld as violating the rules of the Constitution, yet where a committee purports to be investigating propaganda, subversive propaganda, un-American propaganda in the United States, the communist party and its members, and the Communist party being a legal party is not subject at the hands of this Committee to an investigation of that sort. I think we have shown that there was some rather silly legislative proposition which never even jelled because they were advised by the Attorney General that it would not stand up.

I say all this is persuasive of the argument that this defendant did not have a fair trial to which he is entitled under the law, and that Your Honor should now enter a judgment of acquittal and, secondly, if your Honor doesn't see fit to do that, that Your Honor arrest judgment and that Your Honor grant a new trial.

The Court: Mr. McCabe, all of the points you have made this morning have been fully considered by me after exhaustive argument during trial, and nothing you have said this morning, and nothing in my thinking since the trial has changed my views and, therefore, I deny your motions.

Now, as to sentence, I want to suit the convenience of counsel, who are from out of the City, as much as possible. The probation officer, pursuant to the rules, has made a preliminary report to me and, of course, it cannot be completed without the defendant making a statement. He
 479 doesn't have to make one either before the motion for a new trial has been heard, or after, but if he desires to make one which he thinks might be helpful to me in pronouncing the proper sentence I will give him that opportunity and postpone sentence to another date which is suitable to the convenience of counsel.

Mr. McCabe: Your Honor, I wouldn't request a continuance. I think the defendant would like to avail himself of his right, under Rule 32, to make a statement.

The Court: Suppose I postpone it until this afternoon?

Mr. McCabe: I think he is prepared to do it now. He has talked to the Probation Officer at 9:30 this morning, and previously had forwarded to the Probation Officer some biographical material, and the Probation Officer considered that satisfactory and, after a short talk this morning, thought that there was nothing further he wanted him to offer.

Is that correct, Mr. Brodsky?

Mr. Brodsky: Yes.

The Court: Will you ask the Probation Officer to send us the report, Miss Jobe?

Mr. McCabe: Perhaps I misunderstood Mr. Brodsky; I thought he said he had referred it to you.

Mr. Brodsky: I sent in some voluminous material, and I visited him at 9:30 this morning with Mr. Dennis.

The Court: I see, the preliminary report?

Mr. Brodsky: I asked him as to whether he wanted
480 any more information and he didn't think that there was anything more he wanted to ask Mr. Dennis this morning, and shook hands and said, "Good-bye."

The Court: But you gave him nothing further?

Mr. Brodsky: No, I came in this morning with Mr. Dennis, and told him Mr. Dennis was with me, and wanted to know if there was anything further he wanted and he said he didn't think anything more was necessary. I said Mr. Dennis was here for that purpose, and he said he didn't think that there was anything more he wanted to see him about, and we shook hands.

The Court: The opportunity, of course, is available to Mr. Dennis to say anything he wanted to him.

Mr. Brodsky: That is what we went there for.

The Court: Wait until we get him here?

Will you ask him to come around?

Mr. Brodsky: In other words, I do not want the Court to get the idea that there was any lack of cooperation, or deliberate attempt to avoid meeting the Probation Officer in any way.

The Court: Where is the Probation Officer, do you know?

The Deputy Clerk of Court: I have sent for Mr. Garrett. This is Mrs. Yeatman from the Probation office.

The Court: Where is Mr. Garrett?

Mrs. Yeatman: He is out to lunch, and is expected
481 back in about ten minutes.

The Court: All right I am afraid we will have to postpone this until two o'clock.

Will you be good enough to ask him to be available at two o'clock?

Mrs. Yeatman: Yes, sir, I will.

The Court: We will recess until two o'clock.

• • • • •
482 The Court: Mr. Reporter, will you read the colloquy that was had just before the recess with reference to the Probation Officer?

(Record read as directed.)

The Court: Now, you have heard that colloquy, Mr. Garrett. Does that conform to your recollection?

Mr. Garrett: In general, your Honor, I believe that is correct. There might have been some little misunderstanding between counsel and myself as to whether he did want to make a statement. I suggested to Mr. Dennis, as I recall, that he did not have to make any statement in connection with preparation for a new trial. That was the information I gave him. I suggested it was all right with me if it was all right with him.

Mr. Brodsky asked me if I had received certain material, and I told him I had, and it appeared to be satisfactory up to that point, and I did not press him for a statement.

The Court: Now, Mr. McCabe, inasmuch as the motions have been denied, I wish to give Mr. Dennis the same opportunity which is given to any defendant to make a statement,

if he wishes to make one, that might be valuable to the Court.

483 Mr. McCabe: I think I have nothing further, but he proposes, and he would like to avail himself of the provisions of Rule 32-(a), before imposing sentence the Court shall afford the defendant an opportunity to make a statement in his own behalf.

The Court: You don't care to make it for him?

Mr. McCabe: No, I think I have said about all I care to say for him.

The Court: I usually look to counsel and give him that opportunity.

Yes, Mr. Dennis?

Mr. Dennis: Your Honor, before the court passes sentence I would like to make a very brief statement pertaining to and arising in this case.

As an American and as a Communist, I cherish and will always defend the democratic institutions of our country and the genuine interests of our people.

On this occasion I desire to make clear why I believe that my failure to respond to the subpoena unlawfully issued by the House Committee on Un-American activities is wholly consistent with my respect for and devotion to the instruments and traditions of American democracy.

Those who conceived this nation in liberty could not foresee that a vast empire of monopoly capital would one day come into being. Nor could they foretell that the
484 economic royalists would attempt to enslave America's working men and women with a Taft-Hartley law and other repressive measures.

But the founding fathers wisely sought to provide all future generations of freedom-loving Americans with the means to defend themselves against whatever new forms of tyranny the uncharted future might hold.

Those who dedicated this nation to the proposition that all men are created equal could not envision the race hatred and terror rule of fascism, be it of foreign or domestic origin.

Those who brought forth a new nation on this continent could not conceive of a Truman-GOP doctrine proclaiming America the enemy of newer democracies and the ally of decaying monarchs and fascists quislings.

But the founding fathers did foresee that their posterity would have need to struggle against new enemies and new instruments of oppression. Those who endowed our people with the spirit that cherished liberty as the heritage of all men, in all lands everywhere—also sought to arm us against whatever threats to liberty the future might bring.

For these wise purposes, those who shaped our Declaration of Independence and our Constitution proclaimed certain rights to be inalienable. They reserved to the people, and for all time, the right to exercise their sovereign power and democratic will and to pursue happiness and
485 progress. Moreover, they erected an enduring barrier of law, embodied in the Bill of rights, designed to prevent the rule of despotic men.

It is true that there are today men who hold these principles and democratic institutions in contempt and seek to undermine and destroy them.

It is not true that I am guilty of that criminal intent.

I deeply regret that the real issues in this case were not joined in the course of the trial.

Through my counsel, witnesses and documents I sought to submit evidence establishing it as a matter of fact that the House Committee on Un-American Activities is in contempt of the Constitution and Bill of Rights, that it is trying to establish a system of totalitarian thought control, police inquisition and the hated Gestapo card-indexes and political blacklists. And that, in short, it is an instrument of those who seek to impose a form of fascism on our America.

But, unfortunately, the jury was not permitted to hear this evidence.

I also sought to establish as a matter of law that the House Committee on Un-American Activities is not a proper legislative committee, is without constitutional au-

thority, and acts in violation of the First and Fourteenth Amendments.

But the evidence amply supporting this contention was also excluded.

My liberty as an individual is, of course, dear to 486 me. But more is the liberty of the whole American people.

The time has come when not I alone, but millions of Americans—through due process of law and by mobilizing broad public opinion and action—can preserve our freedom only by effectively challenging the usurpation of power by the pro-fascists and their House Committee on Un-American Activities—which has become a gnawing cancer in the body politic.

I repeat, this committee has arrogated to itself inquisitorial and repressive powers specifically forbidden it by the Constitution and Bill of Rights.

Its chairman, J. Parnell Thomas, told this court,—in response to cross-examination—that “We all have our standards” as to what is American and what is un-American.

I submit, Your Honor, that Chairman Thomas’ standards are those of Standard Oil of New Jersey—which has been found guilty of war and peacetime cartel practices more advantageous to our Nazi enemies than to the United States.

I submit that the standards of Representative Mundt, a member of this Committee, are those of the self-styled American First Committee—an anti-Roosevelt and pro-Axis group—condemned and repudiated by all true patriots.

I submit that the standards of John Rankin, whose presence on this committee violates the 14th Amendment and the 487 American conscience, are the standards of the convicted Columbians and of the lynch mob.

It is not to be wondered at that this committee, whose standards of Americanism are alien to democracy and run directly counter to the standards held by the majority of Americans, recently spent no more than ten minutes on its ballyhooed “investigation” of fascist activities in the United States, which daily become more menacing.

Instead, it is only natural that such a committee, and its pro-fascist backers in the NAM and the U. S. Chamber of Commerce, should be whipping up anti-Communist hysteria, in an effort to abolish free trade unions, to lower the living standards of the common people, to drastically curtail the civil liberties of the Negro people, the Communists and all other progressives, and to disrupt American-Soviet friendship, and thus the unity of the United Nations and the cause of peace.

In so doing this committee and its sponsors aim to drag our country down the German road to imperialist expansion, fascism, war and catastrophe.

I am confident, Your Honor, that the lessons of this trial will not be lost on the American people.

I recall that at the turn of the 19th century, Matthew Lyon and others temporarily lost their freedom when they challenged the infamous Alien and Sedition laws which were directed against the followers of Thomas Jefferson.

488 Their devotion to democracy contributed to the recapture and preservation of the freedom of the American people. The people removed the cancer of the alien and sedition laws from the body politic.

I recall that Henry David Thoreau and others also temporarily lost their freedom for challenging the fugitive slave act. Subsequently the cancer of chattel slavery and all its legal instruments were also cut from the body politic.

Today the American people understand how truly Thoreau spoke when he said: "They are the lovers of law and order who uphold the law when the government breaks it."

I plead guilty, Your Honor, of upholding the Constitution and the democratic traditions and basic laws of our land at a time when they are being violated by the House Committee on Un-American Activities and its reactionary sponsors.

If need be, I shall appeal my case to the Supreme Court. At the same time I and my Party will carry the real issues in this case to the court of public opinion for the supreme judgment of the people themselves.

Although it was not given an opportunity to hear important evidence, the jury that found me guilty of contempt arrived at its decision only after long deliberation and with great difficulty. I do not entertain the slightest doubt that legions of my fellow Americans share my determination to protect and extend our form of democracy and, at all
 489 costs, to prevent fascism from coming to power in America.

I have every confidence that these millions will come to understand that the pro-fascist House Committee on Un-American Activities must be curbed and eventually abolished if democracy is to endure in our land.

I have firm faith that the American people will not only win my freedom and full exoneration—but that they will also put the necessary limitations on the activities of the evil forces of aggressive monopoly reaction which the House Committee now shields and in whose interest it acts.

In this connection I am confident that in the fateful elections of 1948, the American people will draw the necessary conclusions concerning the administration of the GOP dominated 80th Congress which gave the House Committee on Un-American activities its new coercive and iniquitous status.

Through this unity of action, the American people will rebuff the Un-American men of the trusts and their political blackmail. The American people will find the ways and means to register their will for democracy, jobs and peace.

Your Honor, I am ready to hear the sentence of this Court.

The Court: Mr. Dennis, the primary purpose of interrogating witnesses before Congressional committees is to assist Congress in formulating legislation. This Committee desired your testimony. That has been denied to them by your refusal to appear and testify. Do you have a
 490 desire to appear before that Committee now and purge yourself of that contempt? If you do I might take action which I think will be just and proper under the circumstances.

If you wish, you may consult your counsel.

Mr. McCabe: Will Your Honor indulge us for a moment?

Mr. Brodsky: Judge, may we have five or ten minutes?

The Court: Very well.

(Thereupon, a short recess was had.)

The Court: Very well, Mr. Dennis, do you wish to make a statement in response to my question?

Mr. Dennis: Your Honor, I must state quite frankly your point of view and suggestion took me quite a little with surprise. I would like to make clear that voluntarily I appeared before that Committee, against the decision of that Committee, on March 26th, to present those policies and the position of my party. I am ready to do so before any Committee of Congress of the United States at any time.

I would say further that what happened in that hearing on the 26th, when I was denied and prevented from giving one iota of testimony before what purported to be a legislative hearing, and taking that into account, plus the experience of the people of our country, and the record of this Committee, I came to the conclusion which I did—the letter which I submitted to that Committee.

491 I would say, Your Honor, that I would defend my party and my activities as a Communist in behalf of what I consider the welfare of our people before any court or any committee, including the Un-American Committee. I am somewhat at a loss as to making a snap decision. Whether I were to appear before that Committee subsequent to this fight is one thing I would like to make clear, that I did not, and would not, change one iota my judgment of this Committee as a pro-fascist instrument, a committee which has usurped constitutional powers, and with every means at my disposal I would challenge the authority and constitutionality of this committee and its activities, which are inimical to the interests of our country. From that it doesn't follow that I would hesitate in the least to appear

before that or any other body. As to my views in respect to that committee, my efforts to challenge its constitutionality and unlawful authority, and its dangerous course—those I would not concede or permit.

The Court: Well, is your answer “yes” or “no” to my question?

Mr. Dennis: As I understood your question, I would not hesitate one moment to appear before that Committee.

The Court: That wasn’t my question.

Mr. Dennis: I am sorry. Would you be kind enough to repeat the question?

The Court: Have the reporter read it back.

The Reporter: (Reading:) “Do you have a desire
492 to appear before that Committee now and purge yourself of that contempt? If you do I might take action which I think will be just and proper under the circumstances.”

Mr. Dennis: I am sorry, your Honor, I did not fully understand the question. I do not consider myself in contempt of the Committee, and least of all of Congress and, therefore, I could not, in good conscience, take an action to purge myself of something which I have not committed, and I would like to stand on my statement.

The Court: Very well.

Mr. Dennis: I am sorry to have delayed the Court.

The Court: Now, Mr. McCabe, do you wish to make any statement before sentence is pronounced?

Mr. McCabe: I think not.

The Court: Very well; Mr. Dennis, will you stand?

It is the judgment of the Court that you be imprisoned for one year and pay a fine of one thousand dollars.

Inasmuch as there is a substantial question involved, I shall enlarge the defendant on bail pending appeal, pursuant to the Rules of the Supreme Court, provided the bondsman signifies his willingness to remain on the bond.

Is the bondsman in Court?

Bondsman: Yes, sir.

The Court: Are you willing to remain on the bond, Mr. Bondsman?

493 Bondsman: Yes, sir.

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569 Filed Jun 26 1947

Requests for Charge to the Jury.

Defendant requests that the Court incorporate in its charge to the jury, the following:

1. The indictment charges that the defendant wilfully failed to appear before the House Committee on Un-American Activities in response to a subpoena served upon him by that Committee. In order to constitute an offense under Section 192 of Title 28, United States Code, the provision of law which defendant is alleged to have violated, the Committee before which he failed to appear must be in fact a Committee of Congress. Unless you find beyond a reasonable doubt that the Committee which allegedly served the subpoena upon the defendant and before which he allegedly failed to appear was in fact a Committee of Congress, you must bring in a verdict of acquittal.

Denied. PINE, J.

2. A Committee of Congress must consist only of Congressman or Congresswomen. It cannot consist of some Congressmen and some non-Congressmen. Defendant was under no obligation to obey the command of such a group of individuals. If you are not convinced beyond a reasonable doubt that the Committee on Un-American Activities was composed entirely of members of Congress, you must bring in a verdict of acquittal.

Denied. PINE, J.

3. Under the Second Section of the Fourteenth Amendment of the Constitution of the United States, Representatives are apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed, but

when the right to vote at any election for the choice
 570 of electors of President and Vice-President of the
 United States, Representatives in Congress, the
 Executive and Judicial officers of the State or the members
 of the legislature thereof is denied to the male inhabitants
 of such State being twenty-one years of age and citizens
 of the United States, or in any way abridged except for
 participation in rebellion or other crime, the basis of rep-
 resentation in that State shall be reduced in the proportion
 which the number of such male citizens shall bear to the
 whole number of male citizens twenty-one years of age in
 such State. If you find that Congress, in apportioning
 Representatives to the State of Mississippi did not take
 into consideration the number of adult male citizens in
 that State whose right to vote was denied or abridged, and
 if you find that in fact there were such citizens whose
 right to vote was denied or abridged in that State, you
 must consider the proportion which the number of adult
 male citizens whose right to vote has been denied or
 abridged bears to the total number of adult male
 citizens in the State of Mississippi. If you find
 that this proportion would, under the provision of
 the last I have just cited to you, cause a reduction in the
 number of representatives which the State of Mississippi
 was entitled to send to Congress, and if you find that no
 representative from the State of Mississippi was elected
 by the State at large then you must conclude that no per-
 son purporting to be a representative from the State of
 Mississippi is in fact entitled, under the Constitution, to
 be considered as such. You are advised that John E.
 Rankin purports to be such a Representative. Under the
 circumstances, I have described, you must then find
 571 that John E. Rankin was not in fact a member of
 Congress and that the Committee on Un-American
 Activities did not consist exclusively of members of
 Congress. You would then be required to bring in a ver-
 dict of acquittal.

Denied. PINE, J.

4. The only purposes for which a Committee of Congress may properly be created are: (a) for the purpose of assisting Congress in passing upon the qualifications of its members; (b) for the purpose of assisting Congress in the exercise of its powers of impeachment; (c) for the purpose of assisting Congress in the aid of legislation.

Denied. PINE, J.

5. I charge you that as a matter of law, the House Committee on Un-American Activities was not created and did not exist for the purpose of assisting Congress in the exercise of its power to pass upon the qualifications of its members or for the purpose of assisting Congress in the exercise of its power of impeachment.

Denied. PINE, J.

6. Unless you find beyond a reasonable doubt that the House Committee on Un-American Activities was created and the time of the alleged offense charged in the indictment, existed for the purpose of aiding Congress in its legislative powers, you must find the defendant not guilty.

Denied. PINE, J.

7. I charge you there is no such thing as a Congressional power of exposure. If you find that the purpose of the House Committee on Un-American Activities was to expose persons considered by the Committee to be un-American, you must find that as a matter of fact, the House Committee on un-American Activities is not a proper Committee of Congress and you must bring in a verdict of not guilty.

Denied. PINE, J.

572 8. If you find that the real purpose of the Committee was to interfere with the rights of persons to hold or express their political, social, economic or philosophic views regardless of how much you may disagree with those views, then you must find that this Committee is not a lawful Committee of Congress and you must bring in a verdict of not guilty.

Denied. PINE, J.

9. If you find that the Committee has consistently engaged in a course of conduct calculated to undermine the Constitutional guarantees of freedom of speech, freedom of press, freedom of assembly and freedom of association, you must conclude that the Committee is not a lawful Committee of Congress and you must bring in a verdict of not guilty.

Denied. PINE, J.

10. If you find that the House Committee on Un-American Activities has existed and has been constituted and has conducted its operations for the sole purpose of denying to the American people their basic civil rights, of subverting and undermining the fundamental guarantees of freedom of thought, freedom of speech and freedom of association, you must conclude that the defendant was under no obligation to appear before it and you must bring in a verdict of not guilty.

Denied. PINE, J.

11. Even if you conclude that the House Committee on Un-American Activities was originally created for a valid legislative purpose, if you find that the Committee in fact has not conducted its activities in aid of that purpose, you must bring in a verdict of not guilty.

Denied. PINE, J.

12. If you find that the defendant was not lawfully summoned to appear before the House Committee on Un-American Activities, you must bring in a verdict of not guilty.

Denied. PINE, J.

573 13. Unless you find beyond a reasonable doubt that at the time defendant was summoned to appear before the House Committee on Un-American Activities, that Committee desired his attendance and testimony in connection with the legislative purpose of the Committee, you cannot find that he was lawfully summoned and you must bring in a verdict of not guilty.

Denied. PINE, J.

14. Unless you are convinced beyond a reasonable doubt that at the time of defendant's failure to appear before the Committee, the Committee desired his attendance and testimony for the purpose of assisting the Committee in considering legislation or otherwise in aid of a legislative purpose, you must bring in a verdict of not guilty.

Denied. PINE, J.

15. If you find that in fact the purpose for which defendant was summoned was in order to lay the foundation for charging him with an offense or for securing his prosecution or imprisonment, you must conclude that the defendant was not lawfully summoned and you must bring in a verdict of not guilty.

Denied. PINE, J.

16. If you find that in fact the defendant was lured by the Committee to the City of Washington by a promise that the defendant would be given an opportunity to make a statement with regard to measures then under consideration by the Committee which would have outlawed the political party of which defendant is a leader and that in fact the Committee did not intend to keep this promise but

574 desired to question the defendant about purely extraneous matters and then to serve a subpoena upon him, you must conclude that the Committee lured the defendant to Washington under cover of false representation solely to serve a subpoena upon him. Under these circumstances, you must find that the defendant was not lawfully summoned and you must bring in a verdict of not guilty.

Denied. PINE, J.

17. If you find that the Committee has taken this action against the defendant for the purpose of bringing about a prosecution against the defendant and that the Committee in doing so has been motivated by the nature of the political views or political affiliation of the defendant, you must bring in a verdict of not guilty.

Denied. PINE, J.

18. If you find that the purpose of the Committee in summoning the defendant was to expose him because of alleged un-American activities committed by him, then you must bring in a verdict of acquittal.

Denied. PINE, J.

19. In order to find the defendant guilty of an offense, you must find that he not only failed to attend at the session of the Committee in question but that he wilfully failed to attend. You cannot conclude that he wilfully failed to attend simply by his not appearing.

Granted. PINE, J.

20. (If letter sent by defendant to the Committee is allowed in evidence, the following charge should be requested:) If you believe that the explanation made by defendant for his failure to appear as contained in a letter "Exhibit " sent by the defendant to the Committee was made in good faith, you cannot find that the defendant wilfully committed the offense charged in the indictment and you must bring in a verdict of not guilty.

Denied. PINE, J.

575 21. In determining whether or not the defendant wilfully failed to appear, you may consider whether he made his explanation honestly and whether that explanation contained a true statement of his conviction and the reasons which motivated his non-appearance regardless of the legal validity of those convictions or those reasons.

Denied. PINE, J.

22. Under the circumstances of this case, I charge you that the word "wilful" as it appears in the statute herein means that the defendant must in addition to knowingly and intentionally failing to appear, have a bad purpose, an evil motive and a specific criminal intent to avoid answering proper questions pertinent to a proper inquiry. In other words, you must find beyond a reasonable doubt not only that the defendant failed to appear before this Committee but that he specifically failed to appear because he

did not want to answer any proper questions relevant to an inquiry conducted for a legislative purpose.

Denied. PINE, J.

23. If you believe that the reasons stated by the defendant for his non-attendance before the House Committee on Un-American Activities pursuant to the subpoena of that committee, were given in good faith and based upon his actual belief, you should consider that in determining whether or not his non-attendance was wilful.

Denied. PINE, J.

577

Filed Jul 1 1947

Motion for New Trial.

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for a continuance of the cause.

2. The Court erred in denying defendant's motion pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure for a transfer of the proceeding to another district upon the ground that the prejudice existing against the defendant in the District of Columbia was so great that he could not obtain a fair and impartial trial in that district.

3. The Court erred in denying defendant's motions to dismiss the indictment.

4. The Court erred in denying defendant's challenge for cause to all government employees selected as jurors.

5. The Court erred in denying defendant's motion for a mistrial upon the ground that the jury had withheld from the Court and defendant's counsel evidence of their bias and prejudice on the voir dire.

6. The Court erred in sustaining the objection of the Government to a reference by counsel for the defendant in his opening statement to the jury to the letter marked Defendant's Exhibit No. 1 for Identification.

578 7. The Court erred in denying defendant's counsel the opportunity to make an opening statement to the jury including among other things the matters contained in Defendant's Exhibits Nos. 2 and 3 for Identification.

8. The Court erred in admitting in the evidence over objection Government's Exhibits Nos. 1, 4, 9, and 11.

9. The Court erred in admitting testimony of the witness John Parnell Thomas to which objections were made.

10. The Court erred in sustaining the Government's objections to questions propounded to the witness John Parnell Thomas upon cross-examination by defendant's counsel, and in excluding preferred testimony of the said witness.

11. The Court erred in admitting testimony of the witness Robert E. Stripling to which objections were made.

12. The Court erred in admitting testimony of the witness Edward Kenneth Nellor to which objections were made.

13. The Court erred in denying defendant's motion to strike out the testimony of the witnesses John Parnell Thomas and Robert E. Stripling.

14. The Court erred in denying the defendant's motion to strike out Government's Exhibits 7, 9, and 10.

15. The Court erred in denying defendant's motion for a judgment of acquittal at the close of the Government's case.

16. The Court erred in excluding testimony of the witness Vito Marcantonio upon the Government's objection, and in excluding preferred testimony of the said witness.

17. The Court erred in excluding from the testimony Defendant's Exhibits Nos. 1, 2, 3, 4, 4-A, 4-B, and 5.

18. The Court erred in denying defendant's motion for judgment of acquittal made at the close of the entire case.

19. The Court erred in denying defendant's requests to charge.

579 20. The Court erred in its charge to the jury.

21. The verdict is contrary to the weight of the evidence.

22. The verdict is not supported by substantial evidence.

JOSEPH R. BRODSKY
Attorney for Defendant
 100 Fifth Avenue
 New York 11, N. Y.

580

Filed Jul 1 1947

Motion in Arrest of Judgment.

The defendant moves the Court to arrest the judgment for the following reasons:

1. The Indictment does not state facts sufficient to constitute an offense against the United States.

2. The Provisions of the Legislative Reorganization Act of 1946 and House Resolution 5 of the House of Representatives, 80th Congress, Creating a Standing Committee of the House known as the Committee on Un-American Activities are unconstitutional.

3. The Committee on Un-American Activities is not a Committee of the House of Representatives in that it does not consist exclusively of members of that House but includes one, John E. Rankin, who, although purporting to act as a representative from the State of Mississippi is not, under Section 2 of the Fourteenth Amendment to the Constitution of the United States and the laws enacted pursuant thereto, authorized so to act or to exercise any of the powers or prerogatives of a member of the House of Representatives.

JOSEPH R. BRODSKY
Attorney for Defendant
 100 Fifth Avenue
 New York 11, N. Y.

Filed Aug 6 1947

Stipulation.

It is hereby stipulated, consented and agreed by and between the attorneys for the respective parties herein that the stenographic transcript of the proceedings in the above entitled action dated July 8, 1947 be, and the same hereby is corrected, subject to the approval of the Court, to read as follows:

Page 2, line 13—After the word “this” insert the word “is” to read “this is a motion, etc.”.

Page 4, line 4—Insert the word “anything” before the word “regarding”. Put a period after the word “propaganda”. Omit the rest of the first line and insert “I think it is utterly impossible to legislate”.

Page 4, line 5—Omit the words “if” and “to”.

Page 4, line 6—Omit the first word “what”. Substitute the word “sees” for the word “says” and insert a comma after word “it”.

Page 7, line 11—Omit the word “heard” and insert the word “heart”.

Page 8, line 5—Omit the words “the indictment” and insert the word “inadvertent”.

584 Page 8, line 6—Omit the word “their” and insert the word “his”.

Page 8, line 12—Insert quotation marks before word “if” and after word “it” on line 13.

Page 9, line 22—Omit the word “property” and insert word “properly”.

Page 10, line 19—Insert the words “for thinking” after the word “imprisoned”. Omit the last word “even”.

Page 10, line 20—Omit the word “these” and insert word “even”.

Page 10, line 23—Insert word “of” before word “practically”. Omit the word “of” after the word “practically” and insert word “all”.

Page 11, line 2—Omit the words "the same as" and insert the words "any more than".

Page 11, line 3—After the word "Party" insert the words "would, if, as some people have charged, it" and substitute the word "advocated" for "advocates".

Page 11, line 13—Omit the word "with".

Page 12, line 7—Omit the word "that" and insert the word "there".

Page 27, line 2—Omit the entire line.

Dated: July 28, 1947.

GEORGE MORRIS FAY
United States Attorney
JOSEPH R. BRODSKY
Attorney for Defendant

So Ordered

EDWARD M. CURRAN
United States District Judge

637

Filed Jul 24 1947

Government Exhibit No. 5.

H. Res. 193

IN THE HOUSE OF REPRESENTATIVES, U. S.,

April 22, 1947.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Un-American Activities of the House of Representatives, as to the willful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron, to appear before the said Committee on Un-American Activities in response to the subpoena served upon him on March 26, 1947, together with all of the facts in connection therewith, under seal of the House of Representatives to the United States attorney for the District of Columbia, to the end that the said

Eugene Dennis, also known as Francis Waldron, may be proceeded against in the manner and form provided by law.

Attest:

JOHN ANDREWS

(Seal)

Clerk

638

Filed Jul 24 1947

Government Exhibit No. 6.

THE SPEAKER'S ROOMS
HOUSE OF REPRESENTATIVES U. S.
WASHINGTON, D. C.

April 23, 1947

The United States Attorney,
District of Columbia.

The undersigned, the Speaker of the House of Representatives of the United States, pursuant to House Resolution 193, Eightieth Congress, hereby certifies to you the willful, deliberate, and inexcusable refusal of Eugene Dennis, also known as Francis Waldron, to appear before the Committee on Un-American Activities of the House of Representatives conducting an investigation under authority of Public Law 601, Seventh-ninth Congress, and House Resolution 5, of the Eightieth Congress, in response to the subpoena served upon him on March 26, 1947, as is fully shown by the certified copy of the report of said committee which is hereto attached.

Witness my hand and the seal of the House of Representatives of the United States, at the City of Washington, this twenty-third day of April 1947.

JOSEPH W. MARTIN, JR.

Speaker of the House of Representatives.

Attest

JOHN ANDREWS

Clerk of the House of Representatives.

(Seal)

639

Filed Jul 24 1947

Government Exhibit No. 7.

JOHN ANDREWS
Clerk

OFFICE OF THE CLERK
HOUSE OF REPRESENTATIVES
WASHINGTON, D. C.

I, John Andrews, Clerk of the House of Representatives, do hereby certify that the attached is a true and correct copy of House Report 289 of the Eightieth Congress, first session, as submitted to the House of Representatives April 22, 1947, by Mr. Thomas of New Jersey from the Committee on Un-American Activities and noted in the Journal of the House of Representatives of April 22, 1947, Eightieth Congress, first session.

In witness whereof I hereunto affix my name and the seal of the House of Representatives, in the City of Washington, District of Columbia, this twenty-third day of April anno Domini one thousand nine hundred and forty-seven.

JOHN ANDREWS

(Sgd)

Clerk of the House of Representatives.

640

HOUSE OF REPRESENTATIVES

April 22 1947

80th Congress
1st Session

Report
No. 289

PROCEEDINGS AGAINST EUGENE DENNIS ALSO
KNOWN AS FRANCIS WALDRON

April 10, 1947

Mr. Thomas of New Jersey, from the Committee on Un-American Activities submitted the following

REPORT

Citing Eugene Dennis also known as Francis Waldron

The Committee on Un-American Activities as created and authorized by the House of Representatives through

the enactment of Public Law No. 601, section 121, subsection Q(2), caused to be issued a subpoena to Eugene Dennis, also known as Francis Waldron, who is general secretary of the Communist Party of the United States. The said subpoena directed Eugene Dennis, also known as Francis Waldron, to be and appear before the said Committee on Un-American Activities on April 9, 1947, and then and there to testify touching matters of inquiry committed to the said committee; the subpoena being set forth in words and figures as follows:

"By Authority of the House of Representatives of the Congress of the United States of America, to Robert E. Stripling. You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, General Secretary Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is chairman, in their Chambers in the City of Washington, on the 9th day of April 1947 at the hour of 10 A. M., then and there to testify touching
641 matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee. Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 26th day of March, 1947.

J. PARNELL THOMAS,
Chairman."

Attest:

JOHN ANDREWS,
Clerk.

The said subpoena was duly served, as appears by the return made thereon by Robert E. Stripling, chief investigator of the Committee on Un-American Activities, who was duly authorized to serve the said subpoena and who

served the said subpoena upon instructions received from the Chairman of the Committee on Un-American Activities. The return of the service by the said Robert E. Stripling being endorsed thereon, which is set forth in words and figures as follows:

"Subpoena for Eugene Dennis ~~also known as Francis Waldron~~ before the Committee on Un-American Activities, United States House of Representatives, served at 11:35 A. M., March 26, 1947, in the Committee's Chambers in Washington, D. C.

/s/ ROBERT E. STRIPLING
Chief Investigator, Committee on
Un-American Activities."

On April 7, 1947, a telegram was sent to Mr. Eugene Dennis, General Secretary of the Communist Party of the United States, which is set forth herein in words and figures as follows:

642

April 7, 1947

Mr. Eugene Dennis

General Secretary, Headquarters, Communist Party
50 East Thirteenth Street, New York, N. Y.

This is to notify you that in response to the subpoena which was served upon you March 26, you are to appear before the Committee on Un-American Activities, at the Committee's Chambers, 225 Old House Office Building at 10 A. M., April 9, 1947, to then and there give testimony under oath concerning matters pertinent to the Committee's inquiry.

ROBERT E. STRIPLING
Chief Investigator, Committee on
Un-American Activities.

The said Eugene Dennis, also known as Francis Waldron, failed to appear before the said Committee on Un-American Activities on April 9, 1947, as directed by the subpoena

served upon him on March 26, 1947, and the willful and deliberate refusal of the witness to appear before the Committee on Un-American Activities is a violation of the subpoena served upon him by the Committee on Un-American Activities and places the said Eugene Dennis, also known as Francis Waldron, in contempt of the House of Representatives of the United States.

643

Filed Jul 24 1947

Government Exhibit No. 8-A.

WESTERN UNION

1947 MAR 18 PM 4 39

WB 18 PD-WR NEW YORK NY MAR 18 403P

REP PARNELL THOMAS
HOUSE OFFICE BLDG

ACCORDING TO THE PRESS THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES IS SCHEDULED TO HOLD HEARINGS COMMENCING MARCH 24, ON REPRESENTATIVE RANKIN'S BILL HR 1884, AND ON REPRESENTATIVE SHEPPARD'S BILL HR 2122. SINCE THESE BILLS DIRECTLY CONCERN THE CIVIL RIGHTS AND STATUS OF COMMUNISTS AND THE COMMUNIST PARTY USA, AND THEREFORE THE DEMOCRATIC RIGHTS OF ALL OTHER AMERICANS, I REQUEST AND INSIST THAT I SHALL BE INVITED TO OFFER TESTIMONY AT THESE HEARINGS IN BEHALF OF THE NATIONAL COMMITTEE OF THE COMMUNIST PARTY. WIRE REPLY COLLECT—EUGENE DENNIS GENERAL SECRETARY COMMUNIST PARTY 35 EAST 12 STREET.

24 HR 1884 HR 2122 USA 35 12.

Government Exhibit No. 8-B.

644

**WESTERN
UNION****MARCH 10, 1947.**

**MR. EUGENE DENNIS
35 EAST 12TH STREET
NEW YORK CITY**

**PURSUANT TO YOUR REQUEST OF MARCH 18, YOU HAVE BEEN
SCHEDULED TO APPEAR BEFORE THE COMMITTEE ON UN-AMERI-
CAN ACTIVITIES ON WEDNESDAY, MARCH 26, AT 11:30 A. M.**

**J. PARNELL THOMAS, CHAIRMAN
COMMITTEE ON UN-AMERICAN ACTIVITIES.**

**CHG. TO COMM. ON
UN-AMERICAN ACTIVITIES.**

Government Exhibit No. 8-C.

645

**WESTERN
UNION****1947 MAR 19 PM 6 03**

WA 216 PD—VR NEW YORK NY 19 533P

**HON J PARNELL THOMAS
HOUSE OFFICE BLDG**

**I AM IN RECEIPT OF YOUR TELEGRAM INFORMING ME THAT MY
REQUEST TO APPEAR BEFORE THE COMMITTEE ON UNAMERICAN
ACTIVITIES HAS BEEN GRANTED AND THAT I AM SCHEDULED TO
TESTIFY ON WEDNESDAY MARCH TWENTY SIXTH AT ELEVEN
THIRTY AM. IN ORDER TO ADEQUATELY PRESENT THE VIEWS AND
POSITION OF THE COMMUNIST PARTY ON HR 1884 AND HR 2122
I SHALL NEED APPROXIMATELY TWO HOURS. PLEASE INFORM ME
BY RETURN WIRE COLLECT EXACTLY HOW MUCH TIME
WILL BE ALLOTTED ME—EUGENE DENNIS EXECUTIVE SEC-
RETARY COMMUNIST PARTY OF UNITED STATES.**

HR 1884 HR 2122.

Government Exhibit No. 8-D.

647

WESTERN UNION**MARCH 20, 1947.**

**EUGENE DENNIS,
EXECUTIVE SECRETARY,
COMMUNIST PARTY OF UNITED STATES,
35 EAST 12TH STREET,
NEW YORK, N. Y.**

WILL BE PLEASED TO GIVE YOU TWO HOURS.

**J. PARNELL THOMAS, CHAIRMAN,
COMMITTEE ON UN-AMERICAN ACTIVITIES.**

• • • • •

648

Filed Jul 24 1947

Government Exhibit No. 9.*Original*

**BY AUTHORITY OF THE HOUSE OF REPRESENTA-
TIVES OF THE CONGRESS OF THE UNITED
STATES OF AMERICA**

To ROBERT E. STRIPLING

You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, General Secretary, Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is chairman, in their chamber in the city of Washington, on 9th day of April, 1947, at the hour of 10:00 A. M., then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 26th day of March, 1947.

J. PARNELL THOMAS,
Chairman.

Attest:

JOHN ANDREWS

Clerk.

(Seal)

649

Filed Jul 24 1947

Government Exhibit No. 10.

Copy

**BY AUTHORITY OF THE HOUSE OF REPRESENTA-
TIVES OF THE CONGRESS OF THE UNITED
STATES OF AMERICA**

To ROBERT E. STRIPLING

You are hereby commanded to summon Eugene Dennis, also known as Francis Waldron, General Secretary, Communist Party of the United States, to be and appear before the Un-American Activities Committee of the House of Representatives of the United States, of which the Hon. J. Parnell Thomas is chairman, in their chamber in the city of Washington, on 9th day of April, 1947, at the hour of 10:00 A. M., then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 26th day of March, 1947.

J. PARNELL THOMAS,
Chairman.

Attest:

.....

Clerk.

(Seal)

Served at 11:35 A.M. March 26, 1947 in the Committee's Chambers in Washington, D. C.

ROBERT E. STRIPLING, *Chief Investigator,*
Committee on Un-American Activities.

.....

650

Filed Jul 24 1947

Government Exhibit No. 11.

WESTERN UNION

APRIL 7, 1947

MR. EUGENE DENNIS, GENERAL SECRETARY
HEADQUARTERS, COMMUNIST PARTY
50 E. 13TH STREET
NEW YORK CITY

THIS IS TO NOTIFY YOU THAT IN RESPONSE TO THE SUBPOENA WHICH WAS SERVED UPON YOU MARCH 26, YOU ARE TO APPEAR BEFORE THE COMMITTEE ON UN-AMERICAN ACTIVITIES AT THE COMMITTEE'S CHAMBERS, 225 OLD HOUSE OFFICE BUILDING, AT 10 A. M., ON APRIL 9, 1947, TO THEN AND THERE GIVE TESTIMONY UNDER OATH CONCERNING MATTERS PERTINENT TO THE COMMITTEE'S INQUIRY.

ROBERT E. STRIPLING, CHIEF INVESTIGATOR,
COMMITTEE ON UN-AMERICAN ACTIVITIES.

.....

Defendant's Exhibit No. 3.

662

Filed July 24 1947

**PROFFERS OF PROOF TO BE INCORPORATED IN
DEFENDANT'S OPENING STATEMENT****I.**

We shall prove during the course of this trial that the so-called Committee on Un-American Activities is not in fact a legislative committee of Congress or of the House of Representatives but is a conspiracy organized and existing for the purpose of denying to the American people their basic civil rights, of subverting and undermining the fundamental guarantees of freedom of speech, freedom of thought and freedom of association. In demonstrating this fact, we shall show:

1. The so-called Committee on Un-American Activities which attempted to compel the defendant to appear before it in Washington, is the most recent of a series of Committees on Un-American Activities known variously as the Dies Committee, the Wood-Rankin Committee and now the Thomas Committee. These Committees have maintained a continuity of purpose, design, activity and personnel, and the present Committee endorses, abides by and has carried out and continues to carry out the policies, precepts and practices of its predecessors.

2. The present Committee, like its predecessors, does not exist for the purpose of formulating or presenting proposals with regard to legislative or other proper action to the House of Representatives.

3. Members of this Committee, as well as all its predecessors, have consistently disclaimed that the purpose for which the Committee has existed and now exists is legislative; they have repeatedly admitted that in fact the real purpose of the Committee is not that of recommending any type of legislative action to the House of Representatives under the powers conferred upon that House by the Constitution of the United States.

4. In all of the years of its existence, the Committee has borne out its disclaimer of a legislative purpose and has never recommended to Congress a single piece of valid legislation.

5. The failure of the Committee to recommend legislation is not due to a lack of activity on the part of that Committee. On the contrary, that Committee has been the most active of any Committee ever created by either House of Congress. We shall present all of the records of the proceedings of this Committee so that the Court and the jury may see the extent and intensity of the activity of this Committee, all of which was directed not to legislation under the Constitution but to other purposes wholly beyond the scope of its authority.

6. The Committee and its members have at all times conspired for the sole purpose of undermining and subverting the fundamental guarantees of liberty written into the Constitution of the United States by controlling thought and suppressing through every possible means, the holding, expression or association for the advancement of any belief—social, economic, political or philosophical—with which members of the Committee disagreed.

7. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has
664 sought to suppress every expression of every individual within the United States, in favor of social and racial equality.

8. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress the expression of the idea that America is a democracy.

9. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress the idea and the expression of the idea that cartels and other monopolist industrial organizations are detrimental to the interests of the American people.

10. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress opposition by everyone in the United States to the Franco government of Spain.

11. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress criticism of the Committee, its activities and purposes, or of members of Congress who support the Committee, by anyone within or without the Halls of Congress.

12. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress advocacy of price control.

13. In pursuance of this conspiracy and in order to effectuate its unlawful purpose, the Committee has sought to suppress advocacy and advancement of every political principle embraced within the New Deal program of the late President Franklin D. Roosevelt, of every idea for international cooperation represented by the thoughts and expressions of the late Wendell L. Willkie.

665 14. In executing its conspiracy to control thought and suppress speech, the Committee has engaged in a concerted effort to employ its powers in order to assassinate the characters of outstanding figures in American life by holding them up to public censure, calumny and vilification.

15. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Henry Agard Wallace, formerly Vice-President of the United States.

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18. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Archibald McLeish, formerly Librarian of Congress and outstanding poet in the United States.

19. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted bru-

tally to destroy the character and standing of John Dewey, Professor Emeritus of Philosophy, Columbia University, noted American philosopher.

666 20. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Bishop Francis J. McConnell, outstanding religious leader.

21. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Harlow Shapley, Professor of Science, Harvard University, one of America's foremost astronomers.

22. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Albert Einstein, world renowned physicist.

23. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Chester Bowles, formerly Administrator of the Office of Price Administration.

24. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of David Lilienthal, now Chairman of the Atomic Energy Commission, formerly head of the Tennessee Valley Authority.

25. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Edgar Warren, Chief of the United States Conciliation Service, United States Department of Labor.

667 26. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Elmer Benson, formerly Governor of the State of Minnesota.

27. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Culbert Olsen, formerly Governor of the State of California.

28. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Sheridan Downey, United States Senator from California.

29. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Frances Perkins, present Chairman of the Civil Service Commission and formerly Secretary of Labor.

30. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Paul Robeson, world famous Negro artist.

31. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Upton Sinclair, noted American novelist.

32. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Leon Henderson, formerly Administrator of the Office of Price Administration.

668 33. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Eleanor Roosevelt, former First Lady of the Land, outstanding woman leader and member of the American delegation to the United Nations Economic and Social Council.

• • • • •
35. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Harold L. Ickes, formerly Secretary of the Interior.

36. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Shirley Temple, at that time sensational child actress.

37. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has attempted brutally to destroy the character and standing of Charles Chaplin, world renowned actor and producer.

38. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and maliciously branded with the stamp of "disloyalty" organizations counting among their members millions of American citizens in order to discourage membership in those organizations and thereby to frustrate the exercise by the American people of their Constitutional right to free assembly and free association.

669 39. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the Congress of Industrial Organizations, a trade union federation to which are affiliated approximately seven million American working men and women in all branches of industry.

40. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the American Civil Liberties Union, a national organization dedicated to the protection of civil rights.

41. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the National Catholic Welfare Conference.

42. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the American Labor Party, a political party in the State of New York which, in 1944, polled approximately 500,000 votes for its candidate for the President of the United States, Franklin D. Roosevelt.

43. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and

slandered the National Council for American-Soviet Friendship, an association of persons devoted to the attainment of friendly relations between the people and governments of the United States and the Soviet Union in accordance with the Charter of the United Nations.

44. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the Anti-Defamation League, whose purpose it is to combat racial and religious prejudice.

670 45. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has vilified and slandered the Southern Conference for Human Welfare, an organization dedicated to improving the social conditions of the oppressed people in the Southern States of the United States.

46. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has interfered with the free political choice of the American people in the election of their public officers.

• • • • •
47. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee has repeatedly intervened to control the designation of representatives for purposes of collective bargaining by employees in all parts of the country, and acting in the interest of employers has sought to defeat the exercise of rights guaranteed to employees by the National Labor Relations Act and by the Constitution of the United States.

48. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee gave aid and comfort during the war to the enemies of the United States and was rewarded with the praise of Nazi propagandists and their cohorts and supporters within this country for the Committee's promotion of disunity, dissension and discord, which endangered the successful prosecution of the war.

671 49. In pursuance of its conspiracy and in order to accomplish its unlawful aims, the Committee, since

the end of the recent war, has continued to carry out the propaganda line of our defeated Nazi enemy and has sought to promote and to fasten upon the people of the United States, the same pattern of thought as that which was imposed upon the German people by Hitler and his associates in the Nazi party.

50. The Committee has carried into execution this conspiracy by arrogating unto itself the power, in the name of Congress, to classify thought and expression as "American" and thus deserving of the support of the American people, or as "Un-American" and thus deserving of the calumny of the American people. It has thus knowingly and deliberately flouted and ignored the provisions of the First Amendment of the Constitution of the United States by presuming, in the name of Congress, to place a government stamp of approval or disapproval upon personal thought and speech.

51. The Committee has executed its conspiracy and has accomplished its unlawful aims by characterizing the individuals and groups to which we have referred as Un-American, subversive and inimical to the interests of the United States without regard to the truth of the assertions they have made and without affording to the individuals attacked the opportunity to defend themselves against that calumny.

52. The Committee has executed its conspiracy and has accomplished its unlawful aims by using its subpoena power to harass individuals and groups because of their beliefs and expressions.

53. In pursuance of its unlawful conspiracy, the Committee has admittedly set itself up as a "grand jury of America." It has usurped the power to decide whether each and every individual in the United States should
 672 be condemned because of the ideas he holds and expresses, to investigate and delve into the personal lives of individuals with whose views the members of the Committee disagree and to seek evidence of possible crimi-

nal conduct on the part of such individuals, whether or not such conduct is related to the views they hold and to require the judicial and executive agencies of the Government to persecute organizations and individuals opposed to the Committee's opinions and activities.

54. The Committee itself has boasted that it maintains a black list of a million persons in the United States and that it makes available this black list for purposes of injuring those whose names appear thereon. This black list consists of the names of individuals whose opinions the Committee considers un-American and the Committee has thus directly caused injury to persons because of their political expressions and beliefs.

55. In carrying out its conspiracy, the Committee has engaged in illegal searches and seizures, in tyrannical interference with the persons and homes of Americans and has consistently and blatantly violated the Constitutional guarantees of personal liberty.

56. In execution of its conspiracy and in the accomplishment of its unlawful aims, the Committee has abused process and has made illegal arrests.

57. In execution of its conspiracy and in the accomplishment of its unlawful aims, the Committee has ignored the processes and procedures prescribed by law for the conduct of its activities and the institution of criminal proceedings.

58. In execution of its conspiracy and in the accomplishment of its unlawful aims, the Committee has conducted its

hearings with utter disregard for elementary rules of
673 impartial investigation and requirements of fairness;

it has accepted testimony consisting almost wholly of surmise, conjecture, hearsay, unwarranted conclusions and unsupported opinions; it has permitted itself, its proceedings and the immunity attached thereto to be used by criminals, labor spies and persons with selfish, ulterior motives to broadcast slanderous charges, unsupported by proof, against American citizens, trade unions, political parties

and public-spirited organizations; and prejudged the persons and organizations which it was investigating.

59. In execution of its conspiracy and in the accomplishment of its unlawful aims, the Committee has constituted itself a star chamber to lead and direct a gigantic campaign of political persecution, and repeatedly and ruthlessly to invade the most precious liberties of the entire American people.

II.

We shall prove that the so-called Committee on Un-American Activities had no proper purpose in attempting to subpoena the defendant, that the defendant did not wilfully fail to appear in response to a lawful subpoena of a Committee of Congress, and that the Committee in seeking to require the defendant's attendance was carrying out its campaign and conspiracy of political persecution. In demonstrating these facts, we shall show:

674 1. The Committee did not subpoena the defendant in this case in connection with any legislative purpose.

2. The only reason for which the subpoena was served upon the defendant was in order to harass him because he is the executive secretary of the Communist Party of the United States, a legal political party.

3. The Committee bears an intense malice and hatred against the defendant because of his political views and particularly because of his support of the doctrine of racial and social equality, of the preservation and extension of American democracy, his opposition to predatory activities on the part of cartels and monopoly enterprises, his opposition to the Franco government of Spain and to fascist forces in the United States and elsewhere in the world, his criticism and denunciation of the unlawful activities of the Committee, his support of increased wages for workers, a greater return to the working farmers and the control of prices and rents, his endorsement of policies designed to

enhance the welfare and liberty of the great majority of the American people.

4. The Committee's design, motive, intent and purpose in subpoenaing the defendant was to lay the basis for placing him in jail so that he would be prevented from expressing his political beliefs.

5. The Committee illegally lured the defendant to Washington with the false promise that he would be given an opportunity to make a statement with regard to certain proposed measures designed to outlaw the political party of which he is a leader, knowing that they would not permit him to make that statement and having the design only to serve him with the subpoena referred to in the indictment.

6. The illegal design and purpose of the Committee in subpoenaing the defendant was stated by the acting Chairman thereof when he declared after the defendant did not appear in response to the so-called subpoena, that the Committee, should, "proceed with the case against Eugene Dennis in absentia."

7. The defendant did not wilfully fail to obey that subpoena. He did not attend the session of the Committee to which he was summoned because in good faith he believed that the Committee was engaged in unlawful activities and was not in fact a Committee of Congress.

8. The defendant presented to the Committee a statement fully indicating his good faith in failing to attend, which statement was knowingly and deliberately suppressed by the Committee in its presentation of this case to the House of Representatives.

III

We shall prove that the so-called Committee on Un-American Activities, by which the defendant was allegedly summoned, was not in fact a Committee of the House of Representatives in that it did not consist exclusively of members of that House but included one, John E. Rankin, who although purporting to act as a Representative from the State of Mississippi, was not authorized so to act or to

exercise any of the prerogatives of a member of the House of Representatives. We shall show:

1. The right of the Negro people, including all Negro adult male citizens, in the State of Mississippi has
676 been consistently denied or abridged.

2. The right to vote of the Negro adult male citizens in the State of Mississippi was denied or abridged at the time of the purported election of John E. Rankin to the House of Representatives, and at the time of the most recent apportionment of Representatives to the State of Mississippi.

3. The denial or abridgement of the right of Negro citizens to vote for Presidential electors, for Representatives in Congress, for Senators and for members of the State Legislature has been accomplished by the action of officials of the State of Mississippi itself, by discriminatory application of statutory voting qualifications, by threats of harm and injury to any Negro citizen who manifested an intention to vote and by a campaign of terror and violence designed to prevent the Negro people from exercising their rights of suffrage.

4. This denial of the right of the Negro people to vote in the State of Mississippi has been state-wide in its effect.

5. None of the purported Representatives from the State of Mississippi were elected by that State at large, but each was elected from a particular district within the State.

6. The proportion which the number of adult male citizens in the State of Mississippi whose right to vote has been denied or abridged bears to the total number of adult male citizens in that State, is approximately one-half.

7. Mississippi is, accordingly, entitled to only four rather than seven seats in the House of Representatives and none
677 of the seven individuals now purporting to act as Representatives from the State of Mississippi in the House of Representatives, including John E. Rankin, was properly elected as such.

8. John E. Rankin, at the time he purported to serve on the so-called Committee on Un-American Activities, was not a Representative from the State of Mississippi but was usurping that title and function and the Committee on Un-American Activities was, therefore, not in fact a Committee of Congress but was a conglomeration of individuals consisting of Congressmen and non-Congressmen, wholly unauthorized to usurp and exercise the powers and prerogatives reserved to a Committee composed of Congressmen alone.

Defendant's Exhibit No. 5.

690

Filed Jul 24 1947

Communist Party, U. S. A.

National Office

35 East 12th Street

New York 3, N. Y.

Telephone:

Algonquin 4-2215

April 10, 1947

Chairman

William Z. Foster

Executive Board

Benjamin J. Davis, Jr.

Eugene Dennis

Elizabeth Gurley Flynn

William Z. Foster

Josh Lawrence

Steve Nelson

Irving Potash

Jack Stachel

Robert Thompson

Louis Weinstock

John Williamson

Organization Secretary

Henry Winston

Dear Mr. Congressman:

According to newspaper reports, the House Committee on Un-American Activities yesterday passed a motion to cite Mr. Eugene Dennis, General Secretary of the Communist Party, for contempt of the House of Representatives.

Before this matter is acted upon by the House, I feel you should be informed of both sides of the question.

For reasons which he stated in a letter to Mr. Thomas, Mr. Dennis did not appear before the House Committee.

In the interests of fairness and justice I enclose for your consideration a copy of Mr. Dennis' communication to Mr. Thomas, on the receipt of which the Committee acted. I ask you to make a careful study of Mr. Dennis' letter before you make up your mind.

Respectfully yours,

JOHN GATES,
35 East 12 Street
New York 3, New York

533

April 8, 1947

Hon. J. Parnell Thomas
Chairman, Committee on Un-American Activities
Old House Office Building
Washington, D. C.

Dear Sir:

This is to inform you that I shall not attend the meeting of your committee on April 9, 1947.

I wish to make it clear that I have no intention thereby to ignore the authority of any lawful congressional body.

For the reasons here set forth it is my opinion that the Committee on Un-American Activities is not a lawful congressional committee and therefore is not a body which may lawfully subpoena witnesses. This opinion is based upon the advice of legal counsel whom I have consulted, to whom I have stated all pertinent information in my possession, and upon whose advice I am relying. From its very inception the Committee on Un-American Activities has acted with a wanton disregard for the Constitution and laws of the country and the American traditions of fairness and decency. As a result it has drawn the condemnation of outstanding citizens and caused the late President Roosevelt to characterize its behavior as "sordid." The illegality of its acts has become a scandal so notorious as to create a

public duty not only to challenge those acts individually, but to establish through due process of law and public opinion the fundamental illegality of the existence of the so-called committee.

I do now challenge the legality of that committee for the following reasons:

I.

First, the resolution under which the committee claims its authority is so vague as to fail to conform to the legal principle that delegated authority must be exactly defined. The committee has *no* authority from the House of Representatives because it has been given no *limitation* of authority. By its acts it has remained within no limits appropriate to a committee of the House, but has arrogated to itself the arbitrary power of a Star Chamber in violation of the Constitution of the United States. The term "un-American" appears in no statute or other legislation. It appears in no executive or administrative regulation. It has been defined by no judicial decision, and is unknown to the law. But if it has no legal meaning, the term "un-American" in the everyday language of the people could mean only something opposed to the liberties of the people and the spirit of the Bill of Rights of our Constitution. But your committee forbids such an interpretation by being itself the violator of the Constitution.

The Communist Party of the United States is a purely American political party. It is the party of the American working class. It is more American than the political parties that serve the narrow interests of wealthier classes. Our American trade unions also were once denounced as of European origin and foreign to America, but they are native organizations serving the interests of 60,000,000 American wage workers, and the backbone of our American democracy. So also the American Communist Party is native to this country and necessary to its democratic life, as measured by the only real test, which is loyalty to our country and its people.

II.

Secondly, having abandoned the field of legislative inquiry in which alone Congress could delegate power, this committee has taken upon itself a police authority. And, at that, it is a police authority alien to the American concept of democracy, a lawless police authority, the prohibition of which is the very soul of the Bill of Rights of the Constitution. The so-called committee assumes the functions and prerogatives of a grand jury while in doing so it surpasses all restrictions placed by law upon a grand jury. Claiming an authority not strictly defined, it acts as a grand jury would if it had no obligation of due process. It assumes much of the function of a criminal court without the obligation to be just or to grant equal protection of the law, smearing and ruining the characters of men and women without according them even the right to confront and cross-examine witness or to make a statement in their own defense against defamation.

III.

Thirdly, this committee does not devote itself to any purposes which Congress could delegate, but arrogantly asserts and pursues purposes and objectives having nothing to do with the legislative functions of Congress, in violation of the laws of the United States.

The committee of which you have long been a member and are now chairman, has for many years habitually
535 and purposefully violated the laws of the United States and its Constitution. It has done so to accomplish purposes which are not and could not be legitimate purposes of Congress in forming and delegating authority to a committee. The purposes openly pursued by your committee are:

a. To establish a blacklist of all persons of opposing political opinion, i.e., of persons of democratic political outlook, or identified with any organization defending the constitutional rights and civil liberties of our country. One

example is the American Labor Party of which the late Franklin D. Roosevelt was the candidate for President.

You compiled a blacklist in violation of a federal statute, and did so by illegal raids, unlawful arrests and illegal searches and seizures. You did so by abstracting names from nominating petitions in violation of law, and from petitions to Congress in violation of the First Amendment of the Constitution, and from the subscription lists of newspapers and periodicals of political views opposed to your own, in defiance of the postal laws of the United States. Nor is this to be denied, for Congressman Mason, one of the members of your committee at the time, said on the floor of Congress on May 17, 1946, speaking of such organizations:

Their records were available, and the Dies Committee did subpoena and seize records of many of these organizations. As a result of that, they compiled a card system of un-American activities and of people engaged in un-American activities of more than 1,000,000 separate indexed cards.

—Congressional Record, p. 5313.

In a recent decision, the District Court of the District of Columbia, disclaiming any general criticism of
536 your committee, characterized some of its acts as
“misrepresenting . . . its power under the subpoena and its power to act as a committee of the House,” and as
“representations and actions amounting to duress and coercion . . .” On that occasion the Court pointed out that the official record of the remarks of the chairman of the time, Martin Dies, confirmed in effect the statement that the committee made use of “the coercive influences of representations and actions indicating legal authority” which it did not possess. The Court said: “Of course, the committee had no such power; the exercise of such power was purely arbitrary.” It pointed out that a man whom the committee sought to convict of contempt was present before the committee “only by virtue of the coercive influences of illegal processes and the exercise of illegal, arbitrary power.” (U. S. v. James H. Dolsen.)

b. To make use of such blacklist by placing it at the disposal of private employers, in violation of law, as shown by the demand by the then chairman that employers utilize such blacklist for the discharge of men and women from employment. All of this is outside of the legislative function of Congress.

c. To intervene in the affairs of trade unions with the same coercive power to influence the choice of one union as against another as a bargaining agent preferred by the employer, in defiance of federal law. All of this is outside the legislative function of Congress.

d. To intervene with the pretended authority of Congress, and with the usurped police power of virtual arrest and lawless seizure, in the national and State elections, in the effort to defeat candidates and political policies representing the "New Deal" tendencies. This was done, for example, in Minnesota to defeat a candidate for governor, and in California to defeat candidates for governor and United States Senator, respectively.

537 e. To employ on the government payroll one or more agents of subversive fascist, Nazi and anti-Semitic organizations, conducting simulated "investigations," so as to build up and utilize such Nazi, fascist and anti-Semitic organizations against the trade unions and political movements of labor and progressive groups, especially attempting to stimulate such fascist organizations as a lawless force to be used against the Communist Party. All of this was evidenced in the so-called examination of the fascist leader of the "Silver Shirt Legion." He testified: "*I thought Mr. Hitler had done an excellent job in Germany for the Germans,*" that he was promoting his fascist organization by preaching the "*sterilization of Jews,*" that the Jews "*are 98 per cent Communist,*" that he "*founded the Silver Legion in 1933, contiguous to the appearance of the so-called New Deal of the Democratic administration . . . to propagandize exactly the same principles that Mr. Dies and this committee are engaged in prosecuting right now; in*

other words, antagonism to subversive influence in the United States."* One of the booklets he attempted to circulate in 100,000 copies was a work written by J. Parnell Thomas, then a member of this committee and now its chairman.

f. To use the pretended authority of a committee of Congress to influence the foreign policy of the United States by baiting and branding as "subversive" and "un-American" those Americans who support the policy of adherence to the United Nations. By means of fantastic slanders borrowed from the Nazi party of Germany, this committee has sought to foment hatred of other nations, and particularly the Union of Soviet Socialist Republics, in the interest of the reactionary political trends toward abandonment of the policies of collective peace adopted by this country under the leadership of Roosevelt.

IV.

Fourthly, the composition of this committee is contrary to law, in that it does not consist solely of persons lawfully holding membership in the House of Representatives of the United States. At least one person is acting as a member of the committee who is not duly and lawfully seated as a member of the House of Representatives. It is an established principle of law that a taint of illegality in a body vested with public authority, even if long tolerated, becomes intolerable and of great importance when by its actions the rights and liberties of men and women are placed in jeopardy.

When a body, tainted with illegality in its origin, invokes criminal law to inflict penalties upon men and women for failure to comply with arbitrary commands, unlawful searches and seizures, bodily kidnapping, libel and property damage, solely under the cloak of authority purportedly derived from Congress, then the victims have the right

* Record of the Un-American Committee, volume 12, pp. 7207-7208.

and the public authority has the duty to scrutinize with cold logic and claims of authority of such a committee.

On this ground, too, I challenge this committee's authority. I deny its claim to be a lawfully constituted committee of the House of Representatives of the United States. I challenge its right to call and question witnesses or to perform any of the functions of a lawfully constituted committee of the House of Representatives. John E.

539 Rankin, acting as a member of your committee, is not a lawfully elected, nor duly seated member of the House of Representatives of the United States. He holds his seat in Congress in violation of the Constitution and beyond the power of the House under Article I, Section 5, of the Constitution to "be the judge of the election, returns, and qualifications of its own members." Congress has unquestioned authority to be the judge of those matters under Article I, Section 5, of the Constitution. But it has no right to qualify as representatives from a State a larger number of persons than apportioned to that State under other provisions of the Constitution.

Section 2 of the Fourteenth Amendment of the United States Constitution says:

*But when the right to vote at any election for the choice of Electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the . . . * inhabitants of such State, being 21 years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such . . . * citizens shall bear to the whole number of . . . * citizens 21 years of age in such State.*

I dispute the lawfulness of the tenure of a seat in Congress and therefore membership in this committee by John E. Rankin.

* The word "male" was eliminated by the Woman Suffrage amendment.

540 At the opening of the 80th Congress, the House of Representatives had authority to seat whoever person or persons it might itself judge to be duly elected and qualified as a representative from Mississippi. It has such authority independently of the judgment of any other authority, *provided* only that the *number* seated should not exceed the limitation fixed by Section 2 of the Fourteenth Amendment.

The House of Representatives went beyond its authority in seating *seven* persons as representatives of the State of Mississippi.

The total number of inhabitants of Mississippi "*21 years of age, and citizens of the United States,*" at the time of the election of November, 1946, was in excess of the number 1,195,079 which was the number found by the Census of 1940. Allowance being made for voluntary abstentions from voting, no less than 750,000 would be the normal number of citizens of Mississippi who would actually cast their votes in an election in which the right to vote was neither "denied" nor "in any way abridged." But only 46,493 votes were cast in Mississippi in that election. Thus well above 700,000 citizens of Mississippi of voting age failed to vote for reasons that cannot be assumed to be voluntary.

The 14th Amendment was proposed by Congress and ratified by all the Northern States and 12 Southern States. Its purpose was to remove from American life the disfranchisement of the people by which Rankin now sits in the House and Bilbo is striving to be seated in the Senate. Its first section determined, and removed from the jurisdiction of Congress and the States, the status of citizens as "*all persons born or naturalized in the United States and subject to its jurisdiction.*" Its second section

540A equally determined as a matter of Constitutional law, and for the purpose of removing the matter from the power of Congress, that when the right to vote is denied "*or in any way abridged,*" "*the basis for representation therein shall be reduced*" in the same proportion.

The Constitution declared that this reduction shall take place even if the abridgement of the right to vote is entirely legal, that is, if the right is "in any way *abridged*." This provision has the sole purpose of preventing the seating of persons in the House of Representatives of the United States whose "election" was accomplished by barring citizens from the polls as in the case of the disgraceful fraud (regardless of whether it be a "legal" fraud) by which Rankin was allegedly elected. It applies to "sophisticated" methods of disfranchisement, as it is put by *American Jurisprudence* (vol. 18).

The second section of this Amendment has the express purpose of protecting the right to vote of the Negro people of the South. Its method is to prohibit the seating of more than a reduced number of persons who might claim seats in Congress on otherwise "lawful" certificates of election from States in which the Negro people were denied the vote. This was recognized by the United States Supreme Court which said:

We doubt very much whether any action of a State not directed by way of discrimination against the Negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. (Slaughter House Cases, April 14, 1873; decision written by Mr. Justice Miller.)

540B The subsequent drive against the Constitution of the United States succeeded by means of a number of crimes. These included murders of no less than 4,000 Negro citizens partly under the aegis of the Ku Klux Klan of which Theodore G. Bilbo is now an open and boastful member, and by the support of which more than 100,000 citizens were disfranchised in the First Congressional District of Mississippi in order to bring about the "election" of John E. Rankin by 5,429 votes.

There is no serious denial that the Constitution is flagrantly violated in the seating of seven alleged representatives of Mississippi in the House of Representatives, or that the Congress itself has no power to seat more than a reduced number.

The general cynicism that has been assumed in the civic and political corruption personified by John E. Rankin is depicted in so well recognized an authority as the *Encyclopedia Americana*. It states that "such amendments as have been added to the Constitution to promote equality of electoral qualifications have not been rigorously enforced by the central government. Such amendments are almost the biggest blind spots of Congress and the national administration." It undertakes to explain the habitual and overt violations of the 14th Amendment as "inevitable," saying:

Suffrage qualifications have been laid down by the nation which are contrary to the mores of large elements of its population.

The mores (that is, the customs) here referred to are the customs by which the men of the Bilbo and Rankin political type systematically and by organized violence and conspiracy prevent the majority of the population of 541 several Southern States from exercising the right to vote. They are the customs, in accord with which five Negroes were murdered by the supporters of Talmadge in Georgia in 1946 in the regular process of suppressing the Negroes' right to vote. The *Encyclopedia* apologetically explains that "*Shrewd, or politically minded, executives and congressmen long ago realized that such rules were impracticable, hence unenforceable.*" It fully admits that such States "are open to the definite penalty of the 14th Amendment," but it adds that "it seems tacitly understood that no serious effort will be made to enforce the amendment strictly."

This authority says that the Constitution, insofar as this provision is concerned, is "allowed to slide gently into the

discard in fairly strict accord with the writings of the sociologists." *

The "sociologists" in this case are, for example, Bilbo, who openly declares "*I am a member of the Ku Klux Klan*" and speaks on the Senate floor of "*N—rs*" and "*Kikes*" and "*Dagoes*" and advocates the disenfranchisement of further millions of Americans, and Rankin, under whose guidance this committee conducts an "*investigation*" allegedly for legislative purposes of Congress by enquiring "*how many Jews there are in the Communist Party.*"

Practically all the 550,000 Negro citizens of Mississippi of voting age remained away from the polls under threats of murder made by the leader of the Democratic Party of Mississippi and its candidate for a United States Senator. He openly spoke of murder as a means he favored for keeping the Negro citizen from voting.

542 The interpretation of the United States Constitution upon which the election of Messrs. John E. Rankin and Theodore G. Bilbo to the House and Senate in 1946 depends is the Dred Scott Decision of 90 years ago. According to this decision Negroes were "*so far inferior that they had no rights which the white man was bound to respect,*" and Negroes living in the South were not included in the words "*people*" and "*citizens.*" The purpose of the 14th Amendment is to make that interpretation forever impossible.

I speak as a Communist in defending the Constitution against you who are subverting it.

But I think I am expressing here the point of view of all of those who defend the rights guaranteed to the American people by the United States Constitution. It is the point of view of those who, in these dangerous times in which we live, wish to preserve our civil liberties as a means of solving the grave problems of our Nation in accord with

* John W. Tait, Ph.D., Kansas Wesleyan University, in *Encyclopedia Americana*, 1946, vol. 10, pp. 72-73.

its great progressive traditions, its Constitution and its democratic institutions.

Yes, we, the American Communists, together with a legion of other patriotic Americans, will carry this fight to the people as a struggle to preserve the character of this nation as a democratic Republic. We will carry on this fight in the spirit of the American Constitution.

We are confident that we will win this fight, and that the Gestapo which you seek to implant in the American system in place of our constitutional liberties will be down as an ugly memory along with the Alien and Sedition Laws which once menaced Jefferson with arrest, and threatened the party he founded with suppression as a "*foreign agent*."

Your un-American assaults upon the Constitution will be rejected by the American people as were the similar
543 deeds of A. Mitchell Palmer and his assistant, J.

Edgar Hoover, who, after the first world war, tried as you do to destroy the great American trade unions and the political rights of labor, the farmers and the Negro people.

Yours truly,

EUGENE DENNIS,
35 East 12th Street,
New York City.

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT

No. 9597

EUGENE DENNIS, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

Appeal from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia).

Argued May 7, 1948

Decided October 12, 1948

Mr. Louis F. McCabe, of the bar of the Commonwealth of Pennsylvania, and *Mr. Earl B. Dickerson*, of the bar of the State of Illinois, *pro hac vice*, by special leave of court, with whom *Mr. David Rein* was on the brief, for appellant.

Mr. John D. Lane, Assistant United States Attorney, with whom *Messrs. George Morris Fay*, United States Attorney, and *John W. Fihelly*, Assistant United States Attorney, were on the brief, for appellee. *Mr. Sidney S. Sachs*, Assistant United States Attorney, also entered an appearance for appellee.

Mr. Frank D. Reeves filed a brief on behalf of the Committee to Enforce the Fourteenth Amendment as *amicus curiae*, urging reversal.

Mr. Belford V. Lawson, Jr., filed a brief on behalf of the National Lawyers Guild as *amicus curiae*, urging reversal.

Before CLARK, PRETTYMAN and PROCTOR, JJ.

CLARK, J.: Appellant was indicted, tried and convicted under the style (to use the language of the indictment) of "Eugene Dennis, also known as Francis Waldron."

Since the identity of the appellant is well established for the purposes of this action and since his real name is immaterial if the conviction is proper, we shall for the sake of brevity refer to him hereinafter as "Dennis", which is apparently the name under which he desires to travel at the present time whether it be a real name or an alias. So far as the actual facts as to the contempt involved in the indictment and trial are concerned there is substantially no conflict.

The case involves proceedings before the U. S. House of Representatives' Committee on Un-American Activities, operating under House Resolution 5 of the House of Representatives of the United States, 80th Congress, bearing date of January 3, 1947. To avoid repetition, it

may be said that this Committee was originally a special committee of the House commonly called the "Dies Committee" which has since by repassage of the House Resolution to the House rules been continued first as a Special Committee, later by the House rules as a standing committee and finally by statute in the same category. It is now commonly known as the "Thomas Committee" following the general practice of reference to Congressional Committees under the name of their chairmen.

Since one of the chief points raised by appellant is a general attack on the constitutionality of the creation of the Committee and of the resolutions, rules and statute authorizing its activities, it may be said at the outset that it is the self-same Committee, operating under the same set of resolutions, rules and statute as has been recently passed on by at least two Courts of Appeals, and in two of the cases by the Supreme Court of the United States in denying petitions for certiorari. See *Josephson v. U. S.*, 165 F. 2d 82 (C. C. A. 2d, 1947), *cert. denied*, 333 U. S. 838 (1948), *rehearing denied*, 333 U. S. 858 (1948); *Barsky v. U. S.*, 167 F. 2d 241 (App. D. C., 1948), *cert. denied*, 16 U. S. Law Week 3370 (June 14, 1948); and *Eisler v. U. S.*, F. 2d (App. D. C., June 14, 1948).

These cases were to the unanimous effect that the constitutionality of the authority of the Committee should be upheld, that the creation of the Committee and the matters confided to it for investigation were constitutional and lawful. This would seem to settle this question but since the appellant had devoted a large part of his brief to this subject, his counsel on oral argument was, at the special instance of Justice Prettyman who had written the majority opinion in the *Barsky* case, indulged to argue the question again. This he did with eloquence and persuasiveness, fortified by copious quotations from magazine writers, pamphleteers, and even by some general expressions from some of the Fathers of the Republic which did not seem to be in point. Nevertheless, he failed to convince any member of the court that the law as established by the three cases mentioned *supra* should be overruled.

We therefore feel it unnecessary to discuss this question further except to emphasize this point. Once the rule has been established that the creation of the Committee was within the constitutional powers of the Congress (as has been well established by the three cases noted *supra*), it is neither the business nor the prerogative of this court or any other court to pass upon either the wisdom of Congress in setting up the Committee, the private or public character of members of the Committee or the propriety of the procedure of the Committee unless it transgress the authority committed to it by the Congress under the Constitution.

Dennis was not originally a witness appearing by virtue of process before the Committee. He learned about the investigation through the public press. Thereupon, in the language of the sworn affidavit of his counsel (Joint App. p. 9), he made "formal demand" upon the Committee for the opportunity to appear on behalf of the Communist Party. To this "demand" the Committee courteously responded that it would be glad to have Dennis appear. To this Dennis responded with a somewhat arrogant demand that he be granted at least two hours for his testimony. To this "demand" the Committee again replied courteously that it would be glad to grant him two hours.

When Dennis actually appeared before the Committee, on March 26, 1947, he proved a recalcitrant witness.

Being asked by the Committee for the usual identification, he refused to answer some of the questions directed merely to the question of showing his identity. He refused to answer questions as to the name under which he was born or as to when and where he was born. At this point a Committee subpoena was directed to be served on Dennis. Thereupon, apparently suddenly smitten with the delusion that by some marvelous transition he had been appointed to be the spokesman of all of the American people, Dennis arose and shouted: "In the name of the American people, I hold this Committee in contempt." But then and there Dennis was served with a subpoena commanding his appearance before the Committee on April 9, 1947.

These facts are recited only as the background of the service of the subpoena. Appellant was not indicted or convicted for his conduct in this appearance, although he well might have been upon proper citation. He was indicted and convicted for wilful default in answering a lawful subpoena. It is set out because one of the chief contentions of appellant is that the subpoena was not lawfully served upon him because he had appeared voluntarily and therefore enjoyed some sort of fancied immunity from service.

This contention of appellant that the subpoena was illegally served is without the slightest foundation in reason. It is based upon a misinterpretation of an old case decided in the Supreme Court of the District of Columbia, in 1874, in *Wilder v. Welsh*, 1 MacArthur 566. This case is cited by appellant as establishing the principle that a witness was immune from the service of a subpoena. As a matter of fact, the case holds directly to the contrary. That was a case in which a motion was made to set aside the service of a summons upon the ground that the defendant in a suit, when the service was made upon him, was a witness from one of the States *in attendance upon a congressional committee under a subpoena* and was, therefore exempt from process while in attendance, and in coming and returning from the city. The court held that the privilege of a witness before Congress or any of its committees, stands on the same footing as the privilege of the members of that body, and *that this does not extend to freedom from the service of a simple summons but only to freedom from arrest*. The court overruled the motion on the ground that no privilege had been violated.

To urge that a person who voluntarily appears before a Congressional Committee and is not only in the jurisdiction but the actual presence of the Committee is exempt from subpoena by the Committee itself is preposterous.

On April 9, 1947, appellant failed to appear before the Committee in response to the subpoena. Instead one Lapidus appeared and stated that he (Lapidus) was a secretary of the Communist Party and attorney for Dennis, that Dennis would not appear but had sent a long statement which he (Lapidus) proposed to read into the record. Since Lapidus had not been subpoenaed by the Committee and was not desired as a witness by the Committee he was not permitted to substitute for Dennis nor to read the purported statement of Dennis but was permitted to leave the statement with the Committee which later read the communication but did not include it in its report to the House.

Upon proper citation by the House, Dennis was indicted, tried and convicted for the crime of wilful default in failing to answer the subpoena. In view of the defense which appellant has attempted to set up in this case, it is to be remembered that the case now before this court has nothing to do with the fact that Dennis is a Communist nor does it involve any question of Dennis refusing to answer questions as to his political views or anything else. It has to do solely with the question of whether he wilfully failed to respond to the subpoena of a lawful Committee of Congress.

The so-called "statement" of Dennis was actually sent to each member of the House of Representatives by zealous friends of the appellant. How many members of the House actually read the document we have no means of knowing, and it is immaterial. We say only that we have read it. While it was rejected for inclusion in the report of the Committee to the House and was also rejected by the trial court, it is included in the record as part of appellant's case as Defendant's Exhibit No. 5 (Joint App. p. 395). This should be read in connection with Defendant's Exhibit No. 3, which is a so-called proffer of proof to be incorporated in Defendant's Opening Statement.

One of appellant's chief contentions is that he should have been permitted to have his substitute (Lapidus) read into the record of the hearing of the Committee as a *legal objection* to the validity of the Committee process which would purge him of contempt for his refusal to appear before the very same Committee upon which he had only a few days before been pressing his "formal demands" for the right to appear. "Defendant's Exhibit 5", being the statement which Lapidus sought to read into the record upon behalf of Dennis, is not a statement of legal objections to his appearance before the Committee, and bears none of the characteristics of such a document. It is a long, tedious, irresponsible harangue, for nearly all of its length scurrilous and scandalous, and for the most part completely irrelevant. It does not content itself with a long and most insulting onslaught on the Committee collectively and individually and a denunciation of their character both public and private, but included many others in no way connected with the Committee who had happened to incur the displeasure of the appellant. Thus in this "statement", which is relied upon in this court to show that appellant was only seeking to make a strictly legal objection to his appearance in response to process, the appellant as part of his "legal objections" to not appearing was not content with denouncing the late Theodore Bilbo and the late Eugene Talmadge but went on to denounce the former Attorney General of the United States, the late A. Mitchell Palmer, and also the present and respected head of the F. B. I. of the United States, J. Edgar Hoover, and others. He concluded this with most sanguinary threats as to the political revenge and punishment which he and his associates proposed to wreak on the personnel of the Committee and any other who sympathized with or supported them in the forthcoming elections.

Of course, this was not a legal objection and was properly rejected by the Committee and by the trial court.

The first sentence was as follows: "This is to inform you that I shall not attend the meeting of your committee on April 9, 1947." This was complete and adequate proof that the failure of appellant,

Dennis, to respond to the subpoena was his deliberate and considered act.

Appellant strenuously insists (p. 38 *et seq.* Appellant's Brief) that to make out a case of willfulness under the statute it was necessary that the Government be required to allege and prove that the act of refusal shall have been done from a bad purpose or evil motive. Such is not the law. As far back as *American Surety Co. of N. Y. v. Sullivan*, 7 F. 2d 605, it was said by Judge Learned Hand at page 606: "The word 'willful,' even in criminal statutes, means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law. [*Grand Trunk R. Co. v. U. S.*, 229 Fed. 116, 143 C. C. A. 392] . . ." and citing other cases.

In the well-known case of *Townsend v. United States*, 95 F. 2d 352, at page 358, decided by this court in 1938, this court said: "On the other hand, the general rule in criminal cases is that a mistake of law upon the part of the accused does not constitute justification for his act; that, if he deliberately and intentionally commits the prohibited act, it is criminal, regardless of his belief that his act was lawful; except in cases where ignorance of the law may disprove the existence of a required specific intent . . . This is true even though the motive of the accused may be of the highest, as in the case of one who believes that his act is part of his professed religion."

In the same case at pages 357-8, this court said: "Appellant contends that under the statute here involved the first meaning mentioned by the court, namely, 'done with a bad purpose,' is controlling. The cases cited by the court support that meaning and similar holdings are found in other cases, but, even though it applied that meaning to the peculiar facts of that case, it is clear that the court did not intend to limit the application of the word 'willful' in all cases to 'acts done with a bad purpose.' The meaning of the word depends in large measure upon the nature of the criminal act and the facts of the particular case. It is only in very few criminal cases that 'willful' means 'done with a bad purpose.' Generally, it means 'no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.'" (Quoting from and with approval *American Surety case supra*).

Further at page 358 in the same case, the court said: "The appellant does complain, however, that the court erred in excluding certain evidence . . . sought to be introduced on the theory that it tended to prove justification for his act and hence to disprove willfulness. None of it was admissible on that theory and it was properly rejected by the trial court."

In the very recent case of *Fields v. United States*, decided by this court on October 27, 1947, 164 F. 2d 97, we find the very question raised by appellant in regard to willfulness.

At page 99, this court said: "The principal issues raised on appeal are whether or not the court below erred in failing to direct a judgment of acquittal as to the second count; whether or not the word 'willfully', as used in the statute, implies an evil or bad purpose; and the related question of whether or not good faith has any bearing on the issue of willfulness. The last two issues arise from the

court's charge to the jury that an evil or bad purpose is immaterial, and the court's refusal to charge that appellant's acts assertedly constituting good faith had a bearing on the issue of willfulness. . . .

"Appellant contends that the word 'willful' has a meaning which includes an evil or bad purpose when used in a criminal statute. We think the term has acquired no such fixed meaning according to the type of statute in which it is employed. The Supreme Court has said, long ago, 'In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.'"¹

This court accordingly affirmed the judgment of the District Court.

Appellant in his brief states (Br. p. 38) that the *Fields* case was contrary to the views of the Supreme Court. Apparently the Supreme Court did not think so for it denied certiorari in the *Fields* case on January 12, 1948 (68 Sup. Ct. 355).

So far as the question of willfulness is concerned, the *Fields* case cannot be distinguished from the instant case. That appellant's action was intentional and deliberate was again made perfectly clear after Dennis had been convicted and before he was sentenced. Justice Pine said: "Mr. Dennis, the primary purpose of interrogating witnesses before Congressional committees is to assist Congress in formulating legislation. This Committee desired your testimony. That has been denied to them by your refusal to appear and testify. Do you have a desire to appear before that Committee now and purge yourself of that contempt? If you do I might take action which I think will be just and proper under the circumstances."

After consulting his counsel, Dennis attempted a long statement justifying his position in an apparent misunderstanding of the court's question. When the question was repeated, Dennis declined and stated that he wished to stand on his statement. (Joint App. pp. 360-362).

The mere fact that appellant claimed in his letter to the Committee to have consulted counsel and that his failure to respond to the subpoena was the result of his own legal opinion based upon consultation with his unnamed counsel is no defense. If it were, many corporations, organizations and even individuals would maintain counsel permanently for the purpose of advising them against doing anything that they do not wish to do. Certainly, the letter of appellant (Def. Ex. 5) was not the statement of any legal objection and could not possibly have been considered as representing any advice of counsel. Nor was the so-called "proffer of proof" (Def. Ex. 3) any offer of any legal evidence whatever. Both were properly excluded by the trial court.

Appellant strongly urged that the court erred in denying appellant's motion to transfer the cause from the District of Columbia, and in overruling his challenge of all talesmen who were employees of the United States Government. There is no merit in either contention. On *voir dire*, prospective jurors were carefully interrogated by the court and counsel. Two jurors were excused for cause as having formed opinions. As the jury was finally constituted only three had even as much as heard of the case by reading the newspapers and two of them had merely "scanned the headlines." In

¹ *The Emily and The Caroline*, 9 Wheat. 381, 388 (U. S. 1824).

view of this exhaustive investigation and the repeated assertion of the complete absence of prejudice the contention as to the jury seems pointless.

Jury service is not only a duty of citizenship, it is a right as well. Blanket disqualification for jury service would operate as a bill of attainder on the many hundreds of thousands of federal employees throughout the nation.

In the case of *United States v. Wood*,² the Court upheld the validity of the Act of August 22, 1935, which removed the disqualification of government employees serving on juries in criminal cases in the District of Columbia and held that such statute contravenes neither the Sixth Amendment nor the common law. As said by the Court, the Act of August 22, 1935, concerning qualifications for jurors in the District of Columbia leaves all prospective jurors subject to examination and rejection for actual bias. The Court adds that in dealing with an employee of the Government, summoned to jury service in a criminal case, the court should be solicitous to discover whether, in view of the nature or circumstances, or of the relationship of his particular governmental activity to the matters involved in the prosecution he has actual bias. At page 150, the Court says: "To impute bias as a matter of law to the jurors in question here would be no more sensible than to impute bias to all storeowners and householders in cases of larceny or burglary.

"It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. Unless the suggestion be taken to have reference to some special and exceptional case, it seems to us far-fetched and chimerical. It does not rise to the dignity of an argument to be addressed to the power of Congress to provide a reasonable scheme with respect to the qualifications of jurors. It belongs in the category of 'theoretic or imaginary' interests—'remote' and 'insignificant' as described in the Massachusetts case above cited." See also recent cases in this court: *Higgins v. U. S.*, 160 F. 2d 222 (1946); *Frazier v. U. S.*, 163 F. 2d 817 (1947).

As for the error alleged in the denial of appellant's motion for a change of venue, under the Federal Rules of Criminal Procedure, Rule 21 (a), this motion "is addressed to the sound discretion of the trial court and, in the absence of an abuse of discretion, the denial of the application is not error." *Kersten v. U. S.*, 161 F. 2d 337, 339 (C. C. A. 10th, 1947), cert. denied 67 Sup. Ct. 1744.

We pass now to the point on which appellant's counsel have expended most of their energies and in which in our view their contentions closely approach the fantastic. They contend that the conduct and processes of the Committee are all invalid because the Committee is not in fact a committee of the House of Representatives in that it was not composed exclusively of members of Congress but included Congressman John E. Rankin of Mississippi, who, according to appellant, is not a member of Congress at all, although it is conceded that he had duly presented his credentials from Mississippi as one of the congressmen duly elected to represent Mississippi under the provisions of the Apportionment Act of 1941 and had been sworn and seated by the House of Representatives.

² 299 U. S. 123, 57 Sup. Ct. 177, 81°L. Ed. 78 (1936).

But according to the theory of appellant the election laws and practice of Mississippi do not conform to appellant's views of the requirements of the 14th Amendment to the Constitution of the United States. Therefore, appellant has set up an intricate system of calculation of his own from which he has arrived at the conclusion satisfactory to himself that Mississippi should have been allotted no more than four representatives instead of the seven which they were actually allotted under the Apportionment Act of 1941. From this appellant deduces that *all* of the congressmen from Mississippi are mere interlopers and that none of them is a Member of Congress and that any legislative acts with which they were connected are invalid. It would follow from that that the same rule would apply to invalidate any precedent or subsequent acts of Congress in which Members of Congress from any other state to the election laws and practices of which appellant happened to take exception participated. It would invalidate among other legislation the "G. I. Bill of Rights" bill which was reported by a House Committee of which John E. Rankin was Chairman, and of which he was in charge on the floor, as well as much other important veterans' legislation in the same category. To go a little further back it would have invalidated the Underwood Tariff Act, the Humphrey's Flood Control Act, the Pujo Money Trust Investigation and much other important legislation. Indeed, followed to its logical conclusion it would invalidate all legislation participated in or voted upon by members of Congress from any state of whose election laws appellant disapproves.

We have not before us the question of the election laws of Mississippi and we express no opinion as to them or the election laws of any other state. We say only that the contentions of appellant in this regard are sheer nonsense. The validity of the Apportionment Act of 1941 cannot be attacked in a collateral proceeding.

Justice Keech very properly quoted Watson on Constitutional Law (Vol. I, p. 1653) wherein it is said: "Congress has never exercised the power conferred upon it by this section [14th Amend.] of reducing the representation of a State in the House of Representatives but there can be no question of its power or its right to do so. Of its duty to do so, it alone is the judge. The amendment places the responsibility of enforcing its provisions upon that body."

And to the same effect see Willoughby on the Constitution, Vol. II, 2d Ed., pp. 626, 627. The trial court then properly held as a matter of law that it is not its function to pass upon the issue presented by the motion to take testimony in aid of the motion to dismiss and properly dismissed the motion.

The question is clearly political rather than judicial. In the recent very illuminating case of *Saunders v. Wilkins*, 152 F. 2d 235 (C. C. A. 4th, 1945), *cert. denied*, 328 U. S. 870, which was a case on almost identical issues, Judge Soper, speaking for the court said among other things at page 237: "It is the contention of the appellant, however, that even if the Virginia poll tax law does not offend the first section of the Fourteenth Amendment [which earlier in the opinion the court had decided it did not], nevertheless the statute falls within the terms of the second section of the Amendment by abridging the right of citizens of the United States to vote and therefore the Apportionment Act of Congress of 1941 and the Redistricting Act of

the State Legislature, which failed to take into account the effect of the poll tax act, are invalid with the consequences outlined above. We think that this contention presents a question political in its nature which must be determined by the legislative branch of the government and is not justiciable." And again at page 238, the court said: "It is equally true that the court is without power to reduce the number of Representatives fixed by Act of Congress or to decide in case the number of Representatives from Virginia should be reduced, what disposition should be made of the vacancies thus caused, or to what states they should be allotted in order to maintain the total ordained by Congress. . . . It is true that the pending case takes the form of a suit for damages against the Secretary of State [of Virginia] for failure to certify the candidacy of the appellant, but in order to fix liability upon the Secretary, it would be necessary for this court to hold that notwithstanding the Act of Congress, the number of Representatives from Virginia and therefore of other states in the Union as set out in the Act of Congress is erroneous and should be changed. This determination we have no power to make."

The reasoning of the *Saunders* case applies with greater strength to the case at bar where the 1941 Apportionment Act is only attacked collaterally as an unsound defense in a criminal case. The judgment of the trial court is therefore

Affirmed.

[fol. 417] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Oct. 12, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, OCTOBER TERM, 1948

No. 9597

EUGENE DENNIS, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia (Now United States District Court for the District of Columbia)

Before Clark, Prettyman and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia (now United States District Court for the District of Columbia) and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment—of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Clark.

Dated October 12, 1948.

[fol. 418] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed Nov. 22, 1948. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 9597

EUGENE DENNIS, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to briefs,
2. Opinion.
3. Judgment.

.

5. This designation.
6. Clerk's certificate.

David M. Freedman, Attorney for Appellant.

I have this 17th day of November, 1948, sent copy of the foregoing Designation of Record to Hon. Morris Fay, United States Attorney, District Courthouse, Washington, D. C., attorney for appellee, by United States Mail.

David M. Freedman.

[fol. 419] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 418, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and of the proceedings

of the said Court of Appeals as designated by counsel for appellant in the case of Eugene Dennis, Appellant, vs. United States of America, Appellee, No. 9597, October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 22nd day of November, A. D. 1948.

Joseph W. Stewart, Clerk in the United States Court of Appeals for the District of Columbia Circuit.
(Seal.)

[fol. 420] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

EUGENE DENNIS, Petitioner,

v.

UNITED STATES OF AMERICA

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION
FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner,

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 29, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 30th day of October, 1948.

(9520)

[fol. 421] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, limited to the question whether government employees could properly serve on the jury which tried petitioner. The case is transferred to the summary docket.

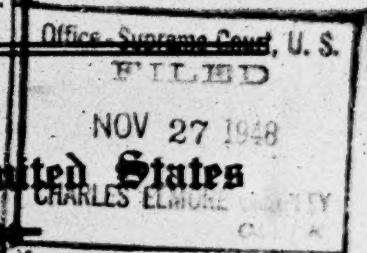
And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.

(3903)

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SUPREME COURT, U. S.

IN THE
Supreme Court of the United States
OCTOBER TERM ~~1946~~



No. ~~434~~ 14

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, DISTRICT
OF COLUMBIA CIRCUIT, AND BRIEF IN SUPPORT
THEREOF**

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INDEX

	PAGE
PETITION	1
Statement of the Matter Involved.....	1
Jurisdiction	10
Statutes and Resolution Involved.....	11
Questions Presented	13
Reasons Relied On for Allowance of the Writ.....	16
Conclusion	25
 BRIEF IN SUPPORT OF THE PETITION.....	 26
Opinions Below	26
Jurisdiction	26
Specifications of Errors	26
Summary of Argument	28
Argument	30
I. The Provisions of the Legislative Reorgani- zation Act of 1946 and House Resolution 5 Creating a Standing Committee of the House Known as the Committee on Un-American Activities are Unconstitutional	 30
II. The Statute and Resolution When Read To- gether Provide no Ascertainable Standard of Guilt in Violation of the Fifth and Sixth Amendments to the Constitution.....	 34
III. The Trial Court Erred in Rejecting Evidence Showing the Inquiry to be Without Legisla- tive Purpose from Its Inception.....	 35

IV. The Petitioner Did Not "Willfully Make Default" Within the Purview of Section 192 of Title 2, United States Code.....	36
V. The Petitioner Was Not "Lawfully Summoned" to the Inquiry Within the Purview of Section 192 of Title 2, United States Code.....	38
VI. The Petitioner's Explanation for His Non-Attendance Was Suppressed by the Committee in Violation of the Resolution Creating It and the Requirements of Section 194 of Title 2, United States Code.....	40
VII. Failure of the District Court to Grant Petitioner's Motion for a Transfer of the Cause and to Sustain the Challenge to Jurors Who Were Government Employees Deprived the Petitioner of a Fair and Impartial Trial Within the Intendment of the Sixth Amendment to the Constitution.....	40
VIII. The Committee on Un-American Activities Was Not in Fact a Committee of the House of Representatives in That It Did Not Consist Exclusively of Members of That House, but Included One John E. Rankin, Who, Although Purporting to Act as a Representative from the State of Mississippi, Was Not, Under Section 2 of the Fourteenth Amendment to the Constitution of the United States and the Laws Enacted Pursuant Thereto, Authorized so to Act or to Exercise Any of the Powers or Prerogatives of a Member of the House of Representatives.....	43

Conclusion	52
------------------	----

CITATIONS

	PAGE
Cases:	
Atlantic Coast L. R. Co. v. Powe, 283 U. S. 40 (1931)	17
Barsky v. United States, 334 U. S. 843	17
Board of Education v. Barnette, 319 U. S. 624 (1943)	16
Carrol v. Becker, 285 U. S. 380 (1931)	24, 48
Chambers v. Florida, 309 U. S. 227 (1940)	32
Chapman, In re, 166 U. S. 61	22
Crawford v. United States, 212 U. S. 183 (1909)	22, 42
Eisler v. United States, cert. granted, November 18, 1948	19, 22, 23
Frazier v. United States, 163 F. 2d 817 (1947)	22
Hartzell v. United States, 322 U. S. 680	23, 37, 38
Herndon v. Lowry, 301 U. S. 242 (1937)	35
Higgins v. United States, 160 F. 2d 222 (1946)	22
Josephson v. United States, 333 U. S. 838, reh. den. 333 U. S. 858	17
Jurney v. McCracken, 294 U. S. 125	23
Kilbourn v. Thompson, 103 U. S. 168	22, 34
Koenig v. Flynn, 285 U. S. 375 (1931)	24, 48
Marbury v. Madison, 1 Cranch (U. S.) 137 (1803)	24
McGrain v. Daugherty, 273 U. S. 135	23
McPherson v. Blacker, 146 U. S. 39 (1892)	24
Milligan, Ex parte, 4 Wall. (U. S.) 2 (1866)	31
Mooney v. Holohan, 294 U. S. 103 (1935)	21, 40
Norton v. Selby County, 118 U. S. 425 (1885)	48

CASES (CONTINUED) :

	PAGE
Palko v. Connecticut, 302 U. S. 319 (1937).....	33
Potter v. United States, 155 U. S. 438 (1894).....	36
Saunders v. Wilkins, 152 F. 2d 235 (C. C. A. 4th, 1945), cert. den. 328 U. S. 870.....	24, 49
Screws v. United States, 325 U. S. 91.....	23, 34, 37, 38
Sinclair v. United States, 279 U. S. 263.....	23, 36, 37
Small v. American Sugar Refining Co., 267 U. S. 231 (1925)	35
Smiley v. Holm, 285 U. S. 355 (1931).....	24, 48, 51
Smith v. Allwright, 321 U. S. 649 (1944).....	46
Spies v. United States, 317 U. S. 492 (1943).....	38
Thomas v. Collins, 323 U. S. 516 (1945).....	32, 33
Townsend v. United States, 95 F. 2d 352 (Ct. of App. D. C. 1938), cert. den. 303 U. S. 664.....	36
United States v. Ballard, 322 U. S. 78 (1944).....	32
United States v. Classic, 313 U. S. 299 (1941).....	46
United States v. Foster, et al., Southern District of New York, C-128-87; C-128-88-99.....	19
United States v. Murdock, 290 U. S. 289.....	23, 36
United States v. Wood, 299 U. S. 123 (1936).....	22, 42
Wilder v. Welsh, 1 MacArthur 566 (Sup. Ct. D. C. 1874)	19, 38
Wood v. Broom, 287 U. S. 1 (1932).....	24, 48

Constitution:

	PAGE
First Amendment	13, 14, 27, 28, 31
Fourth Amendment	13, 27
Fifth Amendment	13, 14, 27, 34
Sixth Amendment	13, 14, 22, 27, 34, 40
Ninth Amendment	13, 14, 27
Tenth Amendment	13, 14, 27
Fourteenth Amendment	15, 16, 23, 24, 29, 43, 45
Article 1, Section 2	43, 47
Article 1, Section 9	13, 27

Statutes and Resolution:

52 Stat. 942, U. S. C. Title 2, Section 192	11, 13, 14, 23, 27, 28, 34, 36, 38
52 Stat. 942, U. S. C. Title 2, Section 194	11, 13, 20, 29, 40
Sec. 121(q)(1), Legislative Reorganization Act of 1946, P. L. 601	12, 13, 28
H. Res. 5 (93 Cong. Rec. 36)	12
Judicial Code, Section 240(a)	10
Federal Rules of Criminal Procedure, Rule 37(b)	10

Treatises and Articles:

	PAGE
Cheney, E. P., Freedom and Restraint: Annals of the American Academy, Vol. 200.....	32
Columbia Law Review, Vol. 47 (April, 1947).....	17
Commager, Henry Steele, Who is Loyal to America? Harpers Magazine (September, 1947).....	17
Harvard Law Review, Vol. 61 (April, 1948).....	18
Lawyers Guild Review, Vol. 7 (March-April, 1947).....	18
Michigan Law Review, Vol. 46 (February, 1948).....	17
New Yorker, November 13, 1948.....	18
University of Chicago Law Review, Vol. 14 (Feb- ruary, 1947)	17
University of Pa. Law Review (February, 1948).....	17

Miscellaneous:

Congressional Globe, 1866.....	45
Elliot's Debates, Vol. IV.....	30, 31
Executive Order 9835.....	5, 21, 40
Jefferson's Manual	20, 39
Reichsgesetzblatt, 1933, 1941.....	19
Rules of the House of Representatives, Rule XXXVI	39
World Almanac, 1947.....	45
H. R. 1884.....	2
H. R. 2122.....	2
H. R. 5852.....	19

IN THE
Supreme Court of the United States
OCTOBER TERM—1948

No.

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, DISTRICT
OF COLUMBIA CIRCUIT**

*To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The petitioner, Eugene Dennis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, District of Columbia Circuit, entered October 12, 1948 (R. 417), affirming a judgment of conviction of the petitioner in the District Court for the District of Columbia (R. 2).

Statement of the Matter Involved

Eugene Dennis, the petitioner herein, is the General Secretary of the Communist Party of the United States (R. 165). In or about the month of March, 1947, the House Committee on Un-American Activities announced through

the public press that it was scheduling hearings on the Rankin Bill (H. R. 1884) and the Sheppard Bill (H. R. 2122) (R. 378). The Chairman of the Committee, John Parnell Thomas, testified at the trial that these two bills generally related to "whether or not the Communist Party should be outlawed in the United States" (R. 174). The Committee in no way having indicated that it intended to afford an opportunity to the Communist Party to present its views on this legislation (R. 199), the petitioner here, on behalf of that Party, wired the Committee requesting an opportunity to be heard (R. 378). Petitioner was thereafter notified that his appearance before the Committee had been scheduled for March 26, 1947 (R. 379). The petitioner requested two hours' time "to adequately present the views and position of the Communist Party on H. R. 1884 and H. R. 2122" (R. 379), and that time was granted (R. 380).

The petitioner appeared before the Committee without counsel on March 26, 1947. He appeared, as has been indicated, voluntarily at his own request to testify concerning proposed legislation affecting a political party of which he was the general secretary. He had been assured that he would have full opportunity to present the views of the Communist Party with respect to the pending measures.

The petitioner was not the first witness called that day (R. 218). While he was sitting in the hearing room, and while another witness was testifying, the Chairman of the Committee quietly called the Committee's investigator to his side and directed him to prepare and be ready to serve a subpoena on the petitioner (R. 203, 216).

"Q. In other words, a half hour, at least, before Mr. Dennis had been called as a witness, at his own request, you had made up your mind to subpoena him for April 9; is that correct? A. I had not made up my mind.

Q. Who had made up his mind, had Mr. Thomas?
A. The chairman of the committee.

Q. Now, when did Mr. Thomas first make known to you that he had made up his mind, before Mr. Dennis

was called, that he would subpoena Mr. Dennis to appear on April 9. A. The chairman called me to his place at the committee hearing room I would say approximately 10:45.

Q. And that was during a session of the committee? A. That is right. Mr. Schmidt was testifying, and he directed me to have a subpoena prepared for Mr. Dennis and for me to serve that subpoena" (R. 235).

The petitioner, unaware of these prearranged plans between the Chairman of the Committee and the investigator, finally was called by the Committee and sworn (R. 167). It then appeared that although the petitioner had been "courteously" (R. 409) granted leave to appear before the Committee, the real purpose of the invitation was to entrap him personally, to stigmatize him and to compel disclosure from him of some alleged violations of law (R. 168). The protests of the petitioner were met by the service of the subpoena upon him, returnable April 9, and the immediate adjournment of the session of the Committee (R. 204).

Prior to the return day, the petitioner wrote to the Chairman of the Committee explaining the reasons why he could not appear (R. 396-407). In his communication, the petitioner pointed out that he had no intention "to ignore the authority of any lawful congressional body" (R. 396). He stated that he had consulted with and obtained the advice of counsel; that the Committee on Un-American Activities was not a lawfully constituted body and from its inception in operation and effect had acted oppressively and beyond the bounds of authority; that the language of the authorizing statute was vague and indefinite without standards and contained no limit on the Committee's power of inquiry; that the Committee since its inception had assumed the inquisitorial function of a grand jury without affording witnesses the procedural safeguards guaranteed by the Constitution; that the Committee since its inception had engaged in non-legislative and unlawful activities; and that the House Committee was unlawfully constituted in

that it did not consist solely of members of Congress, but that at least one person on the said Committee was not a duly qualified member of the House of Representatives.

On April 9, 1947, an attorney for the petitioner appeared before the Committee, asked leave to read the aforesaid communication, which was denied (R. 252), and then left the communication with the Committee (R. 252). Whereupon, the Chairman of the Committee revealed the purpose of the meeting:

"Mr. Mundt: All right, Mr. Stripling, you may proceed with the case against Mr. Dennis in absentia" (Hearings, April 9, 1947, p. 3) (R. 256).

The petitioner's non-appearance was reported to the House of Representatives—but the written explanation for his non-appearance never was read to that body (R. 280). Citation for contempt followed, and on April 30, 1947, the indictment herein (R. 3-4) was returned charging the petitioner with willful default after lawful summons in violation of Section 192 of Title 2, United States Code.

On May 20, 1947, the petitioner moved to dismiss the indictment (R. 5-7). A motion to take testimony in aid of the motion to dismiss the indictment was made on the same day (R. 15-19). The petitioner offered to prove in support of his motion to dismiss the indictment that the Committee on Un-American Activities "was not and is not as a matter of fact" (R. 15) a duly constituted committee of the Congress of the United States; that in fact the purposes and activities of the Committee were unrelated to any proposed legislative action; that the aims and actions of the Committee were in fact illegal and void; that the Committee did not in fact consist exclusively of members of the House of Representatives, but included one John E. Rankin, who, under the provisions of Section 2 of the Fourteenth Amendment, was not authorized to act or to exercise any of the powers or prerogatives of a member of the House of Representatives. The motions were denied (R. 19-27).

On May 20, 1947, the petitioner moved for an inspection of the Grand Jury minutes (R. 7-11) and for dismissal of the indictment because of the suppression of evidence from the said Grand Jury which affirmatively established that petitioner did not willfully fail to appear before the Committee. The petitioner offered to prove that when the communication explaining the reasons for his non-appearance were left with the Committee on April 9, the following occurred:

"Mr. Mundt: I think that probably the committee should consider this statement in executive session and then determine whether or not it is a valid reason for not answering the subpoena and govern its action accordingly" (R. 10).

Yet the Committee in reporting to the House the circumstances of the alleged contempt deliberately withheld from it the petitioner's explanation for his non-appearance. Moreover, the communication appears to have been also withheld from the Grand Jury while it was deliberating as to whether the petitioner had willfully failed to appear before the Committee. The motion to inspect the Grand Jury minutes was denied (R. 26-27).

The petitioner seasonably moved for a transfer of the trial to another venue (R. 27-32, 41) and duly challenged all talesmen who were Government employees (R. 64). The petitioner pointed to the promulgation of Executive Order 9835, March 12, 1947 and to its provisions which called for the discharge from Government employment of any person concerning whom there is "reasonable grounds . . . for belief that . . . (he) . . . is disloyal to the Government of the United States", and that among the "activities or associations which may be considered in connection with the determination of this loyalty", was included "sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as . . . Communist" (R. 28). The petitioner maintained

that Government employees could not lawfully serve as jurors (nearly all of the trial jury were Government employees) in the trial of an indictment initiated by the Committee on Un-American Activities and prosecuted by the Government against the General Secretary of the Communist Party. The petitioner pointed out that the meaning of "sympathetic association" was undefined in the Executive Order and there was no assurance that it would not be construed by the Attorney General to include a recognition by a juror of the rights of a member of the Communist Party (R. 29). Members of the Committee on Un-American Activities had stated openly on the floor of the House of Representatives that they demanded prosecution, conviction and maximum punishment of this petitioner (R. 29). They charged that anything less would open the persons responsible to charges of disloyalty and sympathy to Communism (R. 29). Despite the illegality of the Executive Order, no Government employee could be expected as a matter of law to withstand this imminent threat to his reputation and livelihood if he acquitted the petitioner. Moreover, the petitioner demonstrated that a state of near-hysteria had been engendered by the Committee on Un-American Activities against the petitioner before the trial, and that the oppressive political atmosphere affecting all residents of the District of Columbia was the subject of widespread public comment (R. 29-32). The motions for transfer and the challenge to Government employees were denied (R. 41, 64).

Counsel for the petitioner was not permitted to make his opening statement to the jury (R. 110-111, 143-144, 149-150). He was not permitted to tell the jury that the petitioner had communicated to the Committee prior to April 9 the reasons for his non-appearance; he was not permitted to inform the jury that he would offer the communication into evidence; he was not permitted to inform the jury that he would prove during the course of the trial that the Committee on Un-American Activities was not in fact a legislative committee of Congress and

since its inception had been engaged in non-legislative and unlawful activities (R. 383-392); he was not permitted to inform the jury that he proposed to prove during the trial that the Committee had no proper purpose in attempting to subpoena the petitioner, that the petitioner did not willfully fail to appear in response to a lawful subpoena, and that the Committee in seeking to require the petitioner's attendance was carrying out a conspiracy of political persecution (R. 392-393); nor was counsel permitted to inform the jury that he proposed to prove that the Committee did not consist exclusively of members of the House, but included one John E. Rankin, who although purporting to act as a Representative from the State of Mississippi, was not authorized so to act (R. 393-395).

The Government's first witness was John Parnell Thomas, Chairman of the Committee, who testified on direct examination as to the events of March 26 (R. 162-181). He witnessed the service of the subpoena (R. 170).

Upon cross-examination (R. 191-217), petitioner's counsel was not permitted to question the witness concerning the Committee's interpretation of the terms "subversive" or "un-American" as contained in the authorizing resolution (R. 193-198); counsel was not permitted to question the witness concerning the Committee's non-legislative activities (R. 213-217); he was not permitted to inquire (R. 212-213) whether John E. Rankin had stated that the Committee was the "grand jury" of America (91 Cong. Rec. 275, 1941); indeed, counsel was not permitted to elicit from the witness any replies concerning the composition of the Committee, the Committee's interpretation of its statutory authority, or the nature of its activities (R. 182-217). The Committee had no "official pronouncement" before it (R. 198) as to what was "un-American" or "subversive" when it branded individuals or organizations as subversive or un-American (R. 198). The witness assumed "that every member of our committee now has a very good idea of what constitutes un-American activities: but I can only speak for myself" (R. 193), not for "Mr.

Wood, or Mr. Mundt, or Mr. Peterson, or any of the others" (R. 193). By these standards, the Committee's files of "subversive" persons involved "something like a million individuals or more than a thousand organizations" (R. 189), and the list was "increasing all the time" (R. 190).

The witness, Karl E. Mundt, a member of the Committee, testified on direct examination as to the events of April 9 (R. 249-250). The petitioner did not appear on that day (R. 250).

Upon cross-examination, he conceded that petitioner's eleven page written communication to the Committee explaining the reasons for his non-appearance was not read to the House except the first sentence stating that the petitioner would not appear (R. 256).

At the close of the Government's case, the petitioner moved to strike testimony and for a judgment of acquittal which was denied (R. 257-267).

Upon the opening of petitioner's case, counsel offered into evidence (R. 268-270), petitioner's communication to the Committee (R. 396-407) and the complete proffer of proof made in the opening statement at the commencement of the trial (R. 383-395), and throughout the cross-examination of the Government's witnesses, to all of which objections were sustained.

Counsel again attempted an opening statement to the jury, informing the Trial Court (R. 271) that he intended to tell the jury that counsel would prove through a witness all the matters contained in his proffer of proof (R. 383-395).

"Mr. McCabe: May I repeat, then, your Honor, that I propose to open to the jury and read to them as matters which I intend to prove the paragraphs set forth in Defendant's Exhibit No. 3?

The Court: Yes.

Mr. McCabe: I understand your Honor prohibits me from doing that?

The Court: That is right" (R. 272)

The petitioner called on his own behalf, the witness, Vito Marcantonio, a member of Congress for twelve years (R. 272). Objections to questions put by petitioner's counsel to the witness being sustained almost from the outset (R. 277), the following occurred:

"Mr. McCabe: I propose to prove now by this witness who has been sworn the matters set forth in my proffer of proof which has been marked Defendant's Exhibit No. 3. I propose to ask him seriatim questions which will bring out answers in proof of each one of these items.

Mr. Fihelly: We object to each and every one of those questions, as we have before, and having objected to the subject matter, which has been sustained by your Honor, we will object to the question being propounded of this witness or any witness.

The Court: Objection sustained.

Mr. McCabe: Your Honor grants me an exception?

The Court: Yes. You have your record."

The following colloquy also took place:

"Mr. McCabe: I propose to prove through this question that Mr. Rankin is not a Member of Congress, not a lawfully elected Member of Congress, and is not a member of any committee of Congress.

Mr. Fihelly: It has nothing to do with the issues of this case.

The Court: I sustain the objection. I think that is covered.

Mr. Fihelly: That is Defense No. 1.

Mr. Brodsky: I want to make sure we are getting a witness through whom we are making a proper proffer of proof. Your Honor has ruled on that?

The Court: Very well."

The petitioner thereupon rested and renewed his motion for an acquittal, which was denied (R. 287).

All of petitioner's prayers for instructions (R. 363-369) except two (R. 336) were denied (R. 287-293).

The Court in its charge to the Jury (R. 331-339) left for their consideration virtually only two questions—was the petitioner served with a subpoena, and did he or did he not appear? The Court had excluded all evidence from the trial and from the jury concerning the petitioner's explanation for his non-appearance; excluded all the evidence which sought to establish that in operation and effect the Committee was an unlawful body; that the Committee was unlawfully constituted; that it had been engaged from its inception solely in non-legislative purposes wholly unlawful; and that the purpose of the hearing of April 9 with respect to the petitioner was likewise non-legislative and unlawful.

The jury returned a verdict of guilty (R. 342) after deliberating for six hours (R. 339, 342) and after receiving an additional charge of the Court which virtually compelled the verdict (R. 341-342).

Motions for a new trial (R. 369-371) and in arrest of judgment (R. 371) were duly made and denied. The petitioner was sentenced to imprisonment for a period of one year and a fine of one thousand dollars on July 8, 1947 (R. 362). Bail pending the determination of the appeal was fixed at \$10,000 (R. 362). Notice of appeal (R. 2) was filed on July 8, 1947 (R. 3). On October 12, 1948, the Court of Appeals District of Columbia Circuit unanimously affirmed the judgment below.

Jurisdiction

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 417). By order dated October 30, 1948, Chief Justice Vinson extended the time for filing this petition for certiorari to and including November 29, 1948 (R. 419). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 United States Code, Section 347); Federal Rules of Criminal Procedure, Rule 37(b) (18 United States Code, foll. Section 687).

Statutes and Resolution Involved

(a) Rev. Stats. Sec. 102, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 192:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

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(b) Rev. Stats. Sec. 104, as amended by c. 594, Act of June 22, 1938, 52 Stat. 942, U. S. C. Title 2, Sec. 194:

Whenever a witness summoned as mentioned in section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session, or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

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(c) Sec. 121(a)(1), Legislative Reorganization Act of 1946, P. L. 601, c. 753, 79th Cong., 2d Sess., 60 Stat. 828:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned; to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman and may be served by any person designated by any such chairman or member.

(d) On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

Questions Presented

PART A

1. Whether under the Constitution and in accordance with basic principles of representative government, there is power in the Congress to enact the statute (Public Law 601) creating the House Committee on Un-American Activities.

2. Whether the statute creating a standing committee of the House known as the Committee on Un-American Activities, on its face and as construed and applied by the Committee, is unconstitutional and in contravention of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

3. Whether the power vested by the statute in the House Committee on Un-American Activities to compel testimony under the sanction of punishment for contempt, on its face and as applied and construed by the Committee and the Court in this case, contravenes the provisions of the First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments and Article I, Section 9 of the Constitution.

4. Whether the petitioner was lawfully summoned by the Committee as a witness to the meeting of April 9 within the purview of Section 192 of Title 2, United States Code.

5. Whether the failure of the Committee to report to the House the petitioner's written explanation for his non-appearance contravened the provisions of Section 194 of Title 2, United States Code and the authorizing statute.

6. Whether the Court erred in denying petitioner's motion to inspect the Grand Jury minutes where it appeared

that the Grand Jury, which returned the indictment charging the petitioner with willful default did not have before it petitioner's written explanation for his non-appearance.

7. Whether the Court erred in denying petitioner's motion for a transfer of the trial to another venue.

8. Whether, under the special circumstances of this case, where a contempt proceeding has been initiated by the Committee on Un-American Activities and prosecuted by the Government, and the defendant is a principal officer of the Communist Party, petitioner's challenge to all talesmen who were Government employees and subject to the terms and provisions of Executive Order 9835 should have been sustained.

9. Whether the Trial Court erred in refusing counsel for the petitioner the opportunity to establish by way of opening statement, cross-examination, direct examination, prayers for instruction and other appropriate methods the fact that petitioner had sent to the Committee prior to April 9 a written explanation for his non-appearance; the fact that the Committee was acting beyond its authority and not in aid of a legislative function; the fact that the Committee had no lawful purpose in attempting to subpoena the petitioner to the meeting of April 9; and the fact that the Committee did not consist exclusively of members of the House of Representatives.

10. Whether the exclusion of the aforesaid proof denied the petitioner the elements of a judicial trial and deprived him of rights guaranteed by the First, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution.

11. Whether the Court erred in charging the jury (R. 338) that "willful" as used in Section 192 of Title 2, United States Code, requires only that the petitioner act intentionally and deliberately, as contrasted with accidentally and inadvertently.

PART B

1. Whether the Court of Appeals and the Trial Court were correct in holding that Section 2 of the Fourteenth Amendment is not mandatory upon Congress; in holding that the effect of Section 2 is a "power conferred upon" Congress "of reducing the representation of a State" which Congress may or may not exercise at its discretion and pleasure; in holding that Congress alone is the judge of "its duty" to exercise the power conferred upon it by this section

- (a) Whether, when a violation of the Constitution has continued for seven decades while no issue was brought before a Court in which an individual's right of due process in a criminal trial was prejudiced by the violation; and when the violation has been tolerated on the ground that, if a wrong, it was a wrong without a remedy in the courts because each House is the judge of the election returns and qualifications of its own members; and when the legislative branch of government takes a step further and initiates an action asking the judicial branch to intervene in order to imprison a person who disputes the authority of Congress to seat a larger number of representatives from a State than permitted under Section 2 of the Fourteenth Amendment—whether, then, the judiciary department of government may become a party to the violation of the said Section 2 of the Fourteenth Amendment by the positive action of imprisoning the person raising the issue.
- (b) Whether, in such a case, where the violation has been left without a remedy in the courts on the ground that the remedy lies in Congress alone, while two generations of citizens have been deprived of the vote and men not responsible to the disfranchised millions are seated in Congress—whether a person

in jeopardy of his liberty through a charge of contempt of a committee partly composed of men so seated in Congress in violation of the section of the Fourteenth Amendment can be denied before Congress or before the Court trying him for his freedom, the opportunity to offer proof that the Committee is without authority;—or whether there exists no field of due process that may be claimed in court by a person against whom a congressional committee demands criminal penalty.

Reasons Relied On for Allowance of the Writ

I

The construction of the provisions of law creating the House Committee on Un-American Activities is an important question of federal law which has not been, but should be, settled by this Court. A statute has been enacted creating a permanent governmental body with unlimited power to compel disclosure of a person's opinions and beliefs. All persons are subject to this "continuous and pervasive restraint" on freedom of thought and expression. It is simply not valid to assert today that men may speak freely on every subject, even those subjects which "touch the heart" of things. *Board of Education v. Barnette*, 319 U. S. 624, 642 (1943). The fact is that the expression of ideas is permissible only if, in the opinion of officials of Government, such ideas are not "subversive" or "un-American". The statute here is a "thought control" measure, heretofore unknown to the Constitution and our democratic institutions, engendering fear, self-censorship, and conformity. Ideas of social, economic and political change have been vilified and stigmatized by officials of Government as "subversive" and "un-American". Even the idea of social and racial equality has been condemned (76th Cong., 1st Session, H. R. 2, Jan. 1939). Public citizens,

jurists, philosophers, religious leaders, scientists, artists, writers, trade union leaders, the Negro people, the foreign born, and countless other American men and women have felt the lash of this statute. Liberty of association is constantly threatened as labor unions, civic organizations, humanitarian groups, consumer organizations, political parties, nationality groups, religious societies and the multifold number of significant associations which exist in this country feel the oppressive burden of a heresy measure.

The Court of Appeals in its decision referred to the denial of certiorari by this Court in *Josephson v. United States*, 333 U. S. 838, rehearing den., 333-U. S. 858 and *Barsky v. United States*, 334 U. S. 843, petition for rehearing still pending, as settling "this question" of constitutionality (R. 409). We respectfully submit that a contrary view obtains both in law and in fact. "The denial of a writ of certiorari imparts no expression of opinion upon the merits of the case, * * *". *Atlantic Coast L. R. Co. v. Powe*, 283 U. S. 401, 403 (1931). Moreover, the question will not down. There is a rising tide of feeling that the statute here cannot be squared with the Constitution. The belief is growing that there is a serious need for this Court to exercise its historic function of interpreting the fundamental document (See, for example, Commager, Henry Steele, *Who Is Loyal to America?* in *Harpers Magazine*, September, 1947; 47 *Columbia Law Review* 416-431 (April, 1947) "*Constitutional Limitations on the Un-American Activities Committee*"; 14 *Univ. of Chicago Law Review* 256 (Feb., 1947); 96 *University of Pa. Law Review* 381-401 (February, 1948) "*Restraints on American Communist Activities*"; 46 *Michigan Law Review* 521-532 (February, 1948) "*Investigatory Power of Congress—Validity of the Un-American Activities Committee Inquiries Into Professional and Political Affiliations*"; 61 *Harvard Law Review* 592 (April, 1948) John Lord O'Brian, "*Loyalty Tests and Guilt by Association*"; 7 *Lawyers Guild Review* 57-68 (March-April, 1947) "*The Constitutional Right to Advo-*

cate Political, Social and Economic Change—An Essential of American Democracy"; The New Yorker (November 13, 1948, pp. 134 et seq.) "*The Whole Story*"; also, the widespread comments of the public press and radio). The issues are too grave for this Court to withhold judgment. What is the place of governmental power in our constitutional system? Is there any power in Government under the Constitution and in the light of our historic traditions to restrict in any manner the free advocacy of ideas? Can a representative government, existing by consent of the governed, long endure when any body of ideas, or persons espousing such ideas, are suppressed? It is submitted that these are issues of substance and general importance, involving as they do, the construction and application of a measure which affects basic liberties.

The consequences which flow from a failure to resolve these issues are becoming more evident daily in life itself. Without restraint, officials of Government have issued an "Executive Order" conditioning public employment on the basis of opinion and belief. Pursuant to such Order, an Attorney General issues from time to time a "subversive list" proscribing associations of Americans for the ideas which they espouse. Secret "loyalty" investigations without the slightest semblance of due process are conducted daily, with men and women losing their livelihoods and reputation, and never being afforded the opportunity to confront their accusers. A mere suspicion of nonconformity places persons in peril. Widespread deportation proceedings have been begun against the foreign born, many of whom have lived here most of their mature lives, solely because of their beliefs and associations. Men have been confined to Ellis Island without bail and required to forego food in order to quicken the conscience of officials of Government. "Loyalty" tests and little "Thomas" committees abound on state and local levels. In Ohio, Colorado and California grand juries, convened at the behest of officials in Washington, inquire into citizens' private beliefs, and

associations, seek to compel them to testify against themselves and, with the aid of the judicial process, incarcerate these men and women for indefinite terms without bail. In the legislative halls, officials of Government seriously consider a Mundt-Nixon bill (H. R. 5852) which virtually extinguishes every element of freedom contained in the Bill of Rights, a proposed measure clearly patterned after the Hitler Decrees of 1933-1941 (Compare the Mundt-Nixon provisions and the Nazi-decrees in Reichsgesetzblatt, July 26, 1933, May 26, 1933, July 14, 1933, April 7, 1933, December 4, 1941). Finally, an entire political party, the Communist Party, finds itself faced with the threat by Government of complete suppression charged with no offense other than its mere existence (See the indictments in *United States v. Foster, et al.*, Southern District of New York, C-128-87; C-128-88 to 99). These are only some of the fruits of a statute which for ten years has slowly eroded the foundations of constitutional government. It is submitted that it is time for this Court to call a halt.

On November 18, 1948, this Court granted certiorari in *Eisler v. United States of America*. The constitutional and legal issues in that case are in many respects similar to the ones involved on this application. This Court will have before it in the *Eisler* case consideration of the validity of the authorizing statute creating the Committee on Un-American Activities. The true administration of justice requires that the petitioner here, along with all other persons similarly affected, be afforded the opportunity to present fully and discuss the basic constitutional issues and the reasons why his judgment of conviction should not stand.

II

The Court of Appeals held that the petitioner had been lawfully summoned to the meeting of the Committee on April 9. The decision in *Wilder v. Welsh*, 1 MacArthur 566 (Sup. Ct. D. C., 1874), which the Court below attempted

to distinguish, supports the petitioner's contention. Indeed, the Court below conceded that the privilege of a witness before Congress or any of its committees, stands on the same footing as the privilege of the members of that body so far as freedom from arrest is concerned. But the privilege from arrest, "privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; * * *" *Jefferson's Manual and Rules of the House of Representatives* (Gov't Pr. Office, 1943). Sound reasons exist for protecting a witness from compulsory process while voluntarily testifying before a congressional committee. The legislator is free from arrest and compulsory process so that he may fully perform the functions of his office. The citizen who appears before the legislators to express his views on pending legislation, as is his right, should be assured of an equal freedom. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

III

The ruling by the Court of Appeals that the failure of the Committee to disclose to the House the written explanation for petitioner's non-appearance was "immaterial" (R. 411) appears contrary to the provisions of Section 194 of Title 2, United States Code, and the terms of the authorizing statute creating the Committee. The House cited the petitioner for contempt upon the representation of the Committee that petitioner had willfully defaulted in appearance. The House conducted its deliberations so far as the record here reveals without knowledge that the petitioner had explained in writing prior to the return day the reasons for his non-appearance. Whether the suppression of the document was lawful is a question which should be decided by this Court, affecting as it does the rights of witnesses before legislative committees.

Similar reasons exist for this Court's consideration of the ruling by the Court below on petitioner's motion to inspect the Grand Jury's minutes. The indictment here (R. 4) charges the petitioner with willful default. "The rudimentary demands of justice" (*Mooney v. Holohan*, 294 U. S. 103, 112, 1935) required that petitioner's explanation for his non-appearance be presented to the Grand Jury for their consideration. The determination of the weight to be given to petitioner's reasons for non-attendance was a matter for the Grand Jury to decide, not a matter for the prosecuting officials to withhold.

IV

The Court of Appeals has decided a federal question probably in conflict with applicable decisions of this Court. Failure to grant petitioner's motion for a transfer of the trial and to sustain his challenge to all talesmen who were Government employees constituted serious error. So long as the validity of Executive Order 9835 remains untested, it is clear that it operates as a mandate to every Government employee to avoid any "sympathetic association" with a Communist. The words are undefined. To a layman, especially a Government employee, the terms of the Order, "sympathetic association", might well include the acquittal of the General Secretary of the Communist Party charged with contempt of the House Committee on Un-American Activities. To be stamped as "disloyal" under the Order means to every Government employee loss of livelihood and reputation. It should be observed that the Chairman of the Committee testified before the jury that he had a "subversive list" of a million individuals (R. 189); that it was "increasing all the time" (R. 189); and that the Committee had a rule permitting "agents of the Government to come and see our files" (R. 188). The fact that cessation of employment would not actually follow a verdict against the Government, or

the fact that a juror swore he would not be influenced in his decision were not sufficient grounds for overruling the petitioner's challenge. It was enough that it might possibly be the case. *Crawford v. United States*, 212 U. S. 183 (1909). The decision of this Court in *United States v. Wood*, 299 U. S. 123 (1936) is not to the contrary. This is clearly the "special and exceptional case" (*supra*, p. 150) to which this Court referred. The Court below relied on its own decisions in *Higgins v. U. S.*, 160 F. 2d 222 (1946) and *Frazier v. U. S.*, 163 F. 2d 817 (1947). In the latter case, this Court granted certiorari April 19, 1948, 333 U. S. 873. It is submitted that the decision of the Court below on this issue deprived the petitioner of a fair and impartial trial in violation of the provisions of the Sixth Amendment to the Constitution.

V

The petitioner was not permitted to prove at the trial that his default was not willful. He was not permitted to prove that the Committee was not engaged in aid of any legislative function. He was not permitted to prove that the Committee's composition was illegal. He was not even permitted to prove that the Committee was engaged in a non-legislative purpose at its meeting of April 9. The Court below appears to be of the view that once the constitutionality of a Congressional committee is established, its conduct and activities with respect to witnesses summoned to appear before it are no longer subject to judicial review (R. 409). The issues thus raised by the Court's decision are the same as those pending before this Court in *Eisler v. United States*. The Trial Court and the Court below by affirming, appear to have overruled the long-established doctrine of this Court that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress's limited powers. *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 61;

McGrain v. Daugherty, 273 U. S. 135; *Journey v. McCracken*, 294 U. S. 125. By its exclusion of petitioner's testimony and the refusal of his prayers for instructions, the Trial Court appears to have construed the contempt statute (Section 192 of Title 2, United States Code) as an action to enforce a subpoena contrary to the legislative intent and the applicable decisions of this Court. *Sinclair v. United States*, 279 U. S. 263.

VI

There is also involved here, as in *Eisler v. United States*, the question of the definition of the word "willful" as used in Section 192 of Title 2, United States Code. The Trial Court excluded all evidence relative to the petitioner's good faith and lack of bad purpose. The same issue is involved in many of the pending contempt cases and should be settled by this Court. The decision of the Court below appears to be in conflict with the decisions of this Court. *United States v. Murdock*, 290 U. S. 289; *Hartzell v. United States*, 322 U. S. 680; *Screws v. United States*, 325 U. S. 91.

VII

The Court of Appeals has decided, it is respectfully submitted, a federal question in a way probably in conflict with applicable decisions of this Court. The petitioner contended below that the Committee on Un-American Activities was not in fact a committee of the House of Representatives in that it did not consist exclusively of members of that House, but included one John E. Rankin, who, under the provisions of Section 2 of the Fourteenth Amendment and the laws enacted pursuant thereto, was not authorized to act or to exercise any of the powers of a member of the House of Representatives. The Court of Appeals described this assertion as "fantastic" (R. 414) and

"sheer nonsense" (R. 415). It held that the question is clearly political rather than judicial citing *Saunders v. Wilkins*, 152 F. 2d 235 (C. C. A. 4th, 1945) cert. den. 328 U. S. 870.

The Court below appears to have overlooked the following considerations: (1) the petitioner was prepared to prove, but was not permitted to prove, the extent of the abridgment of the right of the Negro people to vote in the State of Mississippi; (2) the provisions of Section 2 of the Fourteenth Amendment specifically provide that "when the right to vote at any election * * * is denied * * * or in any way abridged * * * the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State"; (3) the petitioner was prepared to prove, but was not permitted to prove, the status of Mississippi's Representatives, including John E. Rankin, in the light of the provisions of the Fourteenth Amendment; (4) the Court below was not required to enjoin the operation of a Congressional function. All that the petitioner asserted was that the Congress could not invoke the judicial process to deprive a person of his liberty unless it first abided by its constitutional obligation; (5) the question raised by the petitioner was not "political". It was the appropriate subject of judicial cognizance. *Marbury v. Madison*, 1 Cranch. (U. S.) 137 (1803); *McPherson v. Blacker*, 146 U. S. 39 (1892); *Wood v. Broom*, 287 U. S. 1 (1932); *Smiley v. Holm*, 285 U. S. 355 (1931); *Koenig v. Flynn*, 285 U. S. 375 (1931); *Carrol v. Becker*, 285 U. S. 380. (1931). *Saunders v. Wilkins*, supra, is not to the contrary.

The provisions of the second section of the Fourteenth Amendment were considered by its framers and by the people who adopted it to be of the most vital importance for securing fundamental freedom. The conditions which gave rise to the enactment of this fundamental section have not disappeared. Discriminatory laws against the Negro people still exist; lynch terror is still prevalent;

incitements by public officials and others to violence against any member of the Negro community who presumes to exercise his constitutional right to vote still continues. There appears to be no reason for judicial participation in the nullification of such a constitutional provision when the issue is presented.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

November, 1948.

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Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM—1948

No.

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (R. 19-27) and the opinion of the Court of Appeals (R. 408-416) are unreported.

Jurisdiction .

The basis for this Court's jurisdiction is set forth in the petition.

Specification of Errors

1. The Court of Appeals erred in holding that the statute creating the Committee on Un-American Activities on its face, and as applied and construed, did not deprive petitioner of rights secured to him by the provisions of the

First, Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution, as well as Article I, Section 9 of the Constitution.

2. The Court of Appeals erred in holding that the petitioner had been lawfully summoned to the inquiry within the purview of Section 192 of Title 2, United States Code.

3. The Court of Appeals erred in holding that the petitioner's explanation for his non-appearance was properly withheld from the consideration of the House of Representatives and the Grand Jury.

4. The Court of Appeals erred in upholding the Trial Court's ruling denying petitioner's motion for a transfer of the trial and his challenge to all talesmen who were Government employees.

5. The Court of appeals erred in upholding the Trial Court's ruling excluding all evidence offered by the petitioner to establish that his default was not willful; that the Committee was not exercising a legislative function in general and with respect to the petitioner, and that the composition of the Committee was unlawful.

6. The Court of Appeals erred in upholding the charge of the Trial Court that the word "willful" as used in Section 192 of Title 2, United States Code, requires only that petitioner act intentionally and deliberately, as contrasted with accidentally and inadvertently.

7. The Court of Appeals erred in holding that the question as to whether the Committee is in fact composed entirely of members of the House of Representatives is not a subject for judicial consideration.

Summary of Argument

The House Committee on Un-American Activities is empowered under Public Law 601 and H. R. 5 solely to investigate into the propagation of ideas. The House of Representatives is without power to authorize such investigation because there is no power in Government under our Constitution to inquire into the personal beliefs of citizens. Our entire history, political and legal, establishes that freedom of thought and expression is unlimited and cannot be subjected to governmental inquisition. It is well established that where a committee of Congress does not have the jurisdiction or power under the Constitution to inquire, the Courts will intervene affirmatively or refuse its processes to impose criminal sanctions. No ascertainable standard of guilt exists in the Resolution and Section 192 of Title 2, United States Code, when read together. Conviction under such circumstances violates the provisions of the Fifth and Sixth Amendments to the Constitution. The record here establishes also that the Committee has no standards for its own guidance. The Resolution authorizes a sweeping inquisition, unconfined and vagrant, into the personal beliefs and affairs of citizens. The Committee has never had a legislative purpose from its inception and it was error to refuse the petitioner the opportunity to establish its non-legislative purpose. The petitioner did not "willfully make default" within the purview of the statute. Petitioner here offered to prove justification to offset the charge of willfulness. Where an alleged contempt of a Committee arises out of an undefined limitless inquiry into areas protected by the First Amendment to the Constitution of the United States, it is error to refuse the opportunity to defendant to present to the jury his explanation for his non-appearance based as it was upon advice of counsel and upon substantial constitutional grounds. Under these circumstances, he was entitled to a charge by the Court that "willfulness" means

with an evil or bad purpose. Recent decisions of this Court support this view. Lawful legislative inquiries are not frustrated by the adoption of the salutary rule that in cases involving free speech, a specific evil intent must be established. In this proceeding, there has been a complete failure of due process. The petitioner was not lawfully summoned to the inquiry because he was served with the subpoena at a time when he was in attendance before the Committee. Witnesses before a congressional committee enjoy the same privileges from arrest and the service of subpoenas as do the members of the committee before whom they appear. Despite the requirements of the Resolution and Section 194 of Title 2, United States Code, petitioner's communication to the Committee was never reported to the House of Representatives which voted to cite him for contempt. Suppression of this communication vitiated the proceedings. It was error to deny petitioner's motion for a transfer of the cause and his challenge to the jury upon the ground that they were Government employees. The promulgation of Executive Order 9835, unlawful as it is, subjects Government employees to dismissal even for "sympathetic association" with a member of the Communist Party. No juror who was a Government employee could be expected to resist the pressure of such unlawful Order and the admitted existence by the Chairman of the Committee of a blacklist of one million citizens whom the Committee considers "subversive". The petitioner was therefore deprived of a trial by a fair and impartial jury as he was entitled under the Sixth Amendment to the Constitution. The Committee on Un-American Activities does not consist exclusively of members of the House of Representatives. One of the members of the Committee was not under Section 2 of the Fourteenth Amendment to the Constitution authorized to act or to exercise any of the prerogatives of a member of the House. This Court is empowered to pass upon the issues involved.

ARGUMENT

I

The provisions of the Legislative Reorganization Act of 1946 and House Resolution 5 creating a standing committee of the House known as the Committee on Un-American Activities are unconstitutional.

The Constitution of the United States was adopted in order to establish a form of government in which official power would cease to be arbitrary and excessive by being strictly limited in scope. The Government of the United States is one of enumerated powers, the limitations on its authority marked out in the Constitution. Discussing "the essential difference between the British government and the American constitutions", James Madison stated in his *Report on the Virginia Resolutions* (*Elliot's Debates*, Phil. 1836, 2nd Ed., Vol. IV, p. 569):

"In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to law".

The power of government to compel disclosures of belief, opinion and association, and to place diverse burdens upon their exercise is nowhere expressly granted in the Constitution. If it be not expressed, is such a power properly an incident to an express power, and necessary to its execution? All our history and traditions, all of our legal precedents answer in the negative. The most dangerous concept affecting constitutional government is the notion that the legislature possesses unlimited means to carry into

execution its limited powers. Thus, the argument that belief and opinion may be abridged out of sheer "necessity" and in order "to preserve the government" has been uniformly condemned. In *Ex Parte Milligan*, 4 Wall. (U. S.) 2 (1866), the Supreme Court stated:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; * * *".

If it is "necessary and proper" for government to classify speech and investigate associations in order to "provide for the common defence" or "to regulate commerce" or "to guarantee the states a Republican form of government", then it follows that the government established by the founding fathers is not one of particular and definite powers only, but one which is vested with general, unlimited powers to legislate on all subjects including the press, religion and every form of belief or opinion. As Madison put it: "And it must be wholly immaterial whether unlimited powers be exercised under the name of unlimited powers, or be exercised under the name of unlimited means of carrying into execution limited powers" (*Elliot's Debates, supra*, p. 568).

The First Amendment to the Constitution of the United States provides as follows:

"Congress shall make *no law* respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances". (Emphasis added.)

The main tradition of American history, of our way of life, is freedom of speech, and of the press, of religion, of teaching, of proposal of change, of independent intellectual self-assertion. Cheney, E. P., *Freedom and Restraint: A Short History* in *Annals of the American Academy of Political and Social Science* (1938), Vol. 200, p. 4. And this is a tradition which we have prized throughout our history. It is indeed true that there have been many intrusions upon this liberty by the law, by the courts, by use of economic power, by public opinion—sometimes by mob violence. "But the claims of freedom have even more constantly asserted themselves". Cheney, E. P., *supra*, p. 4.

The practice of propagandizing by speech, by press, cinema, radio, books, in the meeting hall, the outdoor assembly, the platform and in the multifold other forms which propaganda activities assume is a liberty protected by our fundamental law. "This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy" (Jackson, J. in *Thomas v. Collins*, 323 U. S. 516, 545 (1945)).

Our appeal here is to this Court for the protection of this fundamental freedom. "No higher duty; no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution—of whatever race, creed or persuasion". *Chambers v. Florida*, 309 U. S. 227, 241 (1940). We appeal to this Court to protect the American people from destruction of the constitutional system. Inquiry into speech is in itself an abridgment of speech. Compare, *United States v. Ballard*, 322 U. S. 78 (1944). Classification of ideas into

"American" and "un-American" ideas; into "foreign" and "domestic" ideas is an abridgment of speech.

"The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us".

Jackson, J. in *Thomas v. Collins*, 323 U. S. 516, 545 (1945).

If the resolution creating the House Committee on Un-American Activities is upheld, and citizens subjected to criminal sanctions pursuant thereto, the protection of the First Amendment and the liberties guaranteed thereunder will be lost.

In *Palko v. Connecticut*, 302 U. S. 319 (1937) Mr. Justice Cardozo wrote concerning freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal" (p. 327).

It is submitted, in the light of the foregoing, that Congress is without constitutional authority to enact legislation affecting the propagation of ideas, ideas with which we agree as well as those with which we disagree; that the provisions of the Act creating the Committee on Un-American Activities purport solely to authorize the Committee to inquire into the diffusion of ideas by citizens or groups of citizens; that Congress was without lawful authority to establish such inquiry; that the House Committee on Un-American Activities is therefore an unconstitutional and unlawful body without authority to summon any citizen before it; that no individual is required to appear before such body or make any answer to any inquiry except as he may voluntarily choose to do so.

The statute and resolution when read together provide no ascertainable standard of guilt in violation of the Fifth and Sixth Amendments to the Constitution.

Section 192 of Title 2, United States Code, requires every person summoned to give testimony before a committee of either House of Congress to answer any question "pertinent to the question under inquiry". The statute is a penal statute; the offenses punishable by fine or imprisonment. Clearly this statute, by its very nature, requires in each case that it be read as if it contained the language of the resolution creating the particular committee involved. This is the only conclusion which flows from the decisions in *Kilbourn v. Thompson*, *supra*, and all the related cases which followed it. Compare, *Screws v. United States*, 325 U. S. 91, 95 (1945). And what is the "question under inquiry" when this criminal statute is so read? It is "the extent, character, and objects of un-American propaganda activities in the United States"; and "the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution".

Are the terms of this statute sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties? Can any citizen who is summoned to the Committee determine "the question under inquiry" or whether a question which will be put to him will be "pertinent" to the inquiry? How otherwise can he determine whether a refusal to answer would violate the law? The answers to these questions posed have great significance for it is clear that a statute which does not fix an ascertainable standard is repugnant to the due process clause in the Fifth Amendment to the

Constitution and to the Sixth Amendment where it is provided that an accused shall "be informed of the nature and cause of the accusation." The rule of "ascertainable standards" is applicable alike to civil and criminal cases. *Small Co. v. American Sugar Refining Company*, 267 U. S. 231, 239 (1925).

The resolution here "amounts merely to a dragnet which may enmesh anyone" who advocates social change, no matter how significant or insignificant that change may be. See, *Herndon v. Lowry*, 301 U. S. 242, 263 (1937). The words "subversive" or "un-American" do not have any technical or other special meaning; no well-settled common law meaning.

III

The Trial Court erred in rejecting evidence showing the inquiry to be without legislative purpose from its inception.

The investigation here has avowedly not been in aid of legislation since the inception of the Committee. The petitioner offered to establish this fact prior to the proceedings and at every appropriate point during the trial. He moved before trial for an order by the Court to take testimony in aid of the motion to dismiss the indictment pursuant to the Rules upon the basic ground that the Committee was not engaged in any legislative inquiry (R. 15 et seq.). Counsel for the petitioner in his opening statement (R. 110) indicated that he would offer to the jury proof of non-legislative purpose. The Trial Court refused to permit counsel to make such opening statement (R. 149). All efforts to elicit such information by cross-examination of the chairman of the Committee were denied (R. 195, 198, 212, 215). The offer to prove the non-legislative purpose was again made at the close of the Government's case (R.

268). When petitioner's counsel opened to the jury at the commencement of his own case, he was again prevented from referring to the purposes of the Committee (R. 270). Finally, petitioner called Hon. Vito Marcantonio, a member of the House of Representatives for almost twelve years (R. 272). His qualifications to discuss the activities of the Committee were not disputed (R. 273). The petitioner offered to prove through this qualified witness the non-legislative purposes of the Committee (R. 277; Deft.'s Ex. 3, R. 383). The Court declined to permit the evidence to be introduced with the statement to petitioner's counsel: "You have your record" (R. 277). The matter was raised again in the requests to charge (R. 363).

Proof that a legislative investigation is not in aid of legislation is clearly admissible since it involves the power and jurisdiction of the Committee to act, or to seek the judicial processes of Courts for the punishment of those who allegedly disobey the Committee's summons. *Sinclair v. United States*, 279 U. S. 263, 295 (1923); *Townsend v. United States*, 95 F. (2d) 352, 359-361 (Ct. of App., D. C., 1938), cert. den. 303 U. S. 664 (1938).

IV

The petitioner did not "wilfully make default" within the purview of Section 192 of Title 2, United States Code.

Section 192 of Title 2, United States Code, is derived in major part from the Act of January 24, 1857 (11 Stat. 155). At the time of the passage of the Act, the use of the word "willful" in a penal statute had a well-defined meaning. See *Potter v. United States*, 155 U. S. 438 (1894). It was then understood as signifying an evil intent without justifiable excuse. See the recital of authorities in *United States v. Murdock*, 290 U. S. 389, 394 (1933). The discussion by this Court in the *Murdock* case of the decision

in *Sinclair v. United States*, 279 U. S. 263 (1926), points to the view that "willfulness" in the context of Section 192 of Title 2, United States Code, still retains the same meaning it was intended to have when it was included in the original statute.

The "matter under inquiry" here involved an investigation into "subversive" and "un-American" propaganda. The petitioner challenged the lawfulness of such an inquiry. He justified his non-appearance before the Committee by asserting rights guaranteed to him by the Constitution. He maintained that the Committee was without constitutional base in law and fact, a view held by many segments of the population.

In the context of these facts, it is submitted that the construction of the word "willful" in the statute requires a holding that it means an act done with a bad purpose. The issue was not whether the petitioner's views were correct; the issue was simply whether the jury was entitled to hear his explanation before determining that he was guilty of a contempt of a Committee acting under a vague and undefined resolution empowering it to inquire broadly into propagation of ideas.

Two recent decisions by this Court would seem to provide the answer. In *Hartzell v. United States*, 322 U. S. 680 (1944), the word "willfully" as used in the Espionage Act of 1917 was held to mean with an evil purpose.

In *Screws v. United States*, 325 U. S. 91 (1945), a statute which made it a crime to "willfully" deprive anyone of rights secured to him by the Constitution was held to require a charge by the Court that "willfulness" included an evil purpose or bad motive to save the vague provisions of the statute from constitutional infirmity.

The petitioner does not take the view, contrary to the belief of the Court below, that the explanation for his non-appearance was a bar to the prosecution. His request was simply that the explanation be submitted to the jury under appropriate instructions by the Court. To establish such a rule of law in no way frustrates lawful legislative

inquiries. It merely grants protection to a defendant who asserts basic rights guaranteed to him by our fundamental law. *Spies v. United States*, 317 U. S. 492 (1943), for example, involved the non-payment of taxes. This Court required proof of a specific criminal intent. *Hartzell v. United States*, *supra*, involved obstruction to the enlistment of men in the armed forces. This Court defined "willful" as denoting an evil purpose. The same view was adopted in *Screws v. United States*, *supra*, where the conviction of state officials for slaying their prisoner was reversed. Serious as these matters were to the Government of the United States—the collection of taxes, the raising of armies, the lawless enforcement of the law—this Court nevertheless held that the crime was not established without proof of a specific intent. It is respectfully submitted that the administration of justice would best be served here, in an area involving freedom of thought and expression, by construing the word "willful" in Section 192 of Title 2 as meaning with an evil purpose or bad motive.

V

The petitioner was not "lawfully summoned" to the inquiry within the purview of Section 192 of Title 2, United States Code.

As we have heretofore pointed out, the petitioner was served with a subpoena while he was testifying before the House Committee on proposed legislation then before it for consideration, and before the proceedings had been closed. We respectfully submit that service of a subpoena upon a witness while he is in attendance upon a congressional committee is unlawful and violates his privilege to be free from the service of such process on such occasion.

In *Wilder v. Welsh*, 1 MacArthur 566 (Sup. Ct., D. C., 1874), a motion was made to set aside the service of a

summons upon the ground that the defendant in the suit, when the service was made upon him, was a witness from one of the States in attendance upon a congressional committee.

"The Court unanimously held that the privilege of a witness before Congress, or before any of its committees, stands on the same footing as the privilege of the members of that body, and that this does not extend to freedom from the service of a simple summons, but only from arrest" (p. 566). (Emphasis added.)

This decision makes clear that a witness appearing before a congressional committee enjoys the same privileges as the members of the committee. This includes not only the privilege to be free from arrest, but also from service of subpoenas.

In Jefferson's Manual and Rules of the House of Representatives (Govt. Pr. Office, 1943), it is stated:

*"This privilege from arrest, privileges, of course, against all process the disobedience to which is punishable by an attachment of the person; as a subpoena ad respondendum, or testificandum, or a summons on a jury; * * *" (p. 111). (See also notes on p. 111 in Jefferson's Manual. The House has constantly maintained that its members are privileged from service of a subpoena.)*

It is submitted, therefore, that the petitioner while testifying before the Committee was privileged from all service of subpoenas, and was not "lawfully summoned" to appear before it on April 9, 1947. Indeed, even the rudimentary requirements were ignored for the blank subpoena, filled in by a subordinate, served in the Committee room during the hearing, was not even accompanied by a tender of the required witness fees (Rule XXXVI, Rules of the House of Representatives).

VI

The petitioner's explanation for his non-attendance was suppressed by the Committee in violation of the resolution creating it and the requirements of Section 194 of Title 2, United States Code.

Failure to disclose to the House of Representatives the explanation offered by petitioner for his non-appearance violated the terms of the resolution and statute which together required the report of all pertinent facts to the House. The House was entitled to know all the facts before it made its decision to certify the contempt proceedings to the United States Attorney's office. Clearly, this Court will not speculate as to what the House may have done if it had all the facts before it. Suffice it to say that suppression of this explanation was "a deliberate deception" and "inconsistent with the rudimentary demands of justice". *Mooney v. Holohan*, 294 U. S. 103, 112 (1935).

VII

Failure of the District Court to grant petitioner's motion for a transfer of the cause and to sustain the challenge to jurors who were Government employees deprived the petitioner of a fair and impartial trial within the intendment of the Sixth Amendment to the Constitution.

The grounds for the motion to transfer are succinctly stated in the affidavit in support of the application. We recite them in part:

"There is in force and effect at the present time, Executive Order 9835 issued by the President on March 12, 1947. Notwithstanding its unconstitutionality and illegality, the fact is that this Order provides for the discharge from Government employment of any per-

son concerning whom there is 'reasonable grounds' . . . for belief that . . . (he) . . . is disloyal to the Government of the United States'. Among the 'activities or associations which may be considered in connection with the determination of this loyalty', the Executive Order includes 'sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as . . . Communist'.

"The defendant, Eugene Dennis, is the general secretary of the Communist Party of the United States. The fact that he is a Communist leader has been widely publicized and is well known to every person who reads the newspapers or listens to the radio in the District of Columbia. Moreover, the indictment states that the reason that the defendant was subpoenaed to appear before the Committee was so that he might be questioned about the activities of the Communist Party of the United States.

"The enormous consequences of the Executive Order referred to above make it absolutely impossible to secure a fair and impartial trial in the District of Columbia for a leader of the Communist Party, particularly when the charge against him is laid by the Committee on Un-American Activities. The finding of disloyalty involves not only discharge from employment but a permanent branding as a disloyal and undesirable person, endangering the possibility of earning a livelihood in the future. No individual can be expected lightly to take the risk of incurring such consequences to himself, his family and his associates. The meaning of 'sympathetic association' is undefined in the Executive Order and there is no assurance that it may not be construed by the Attorney General to include a recognition of the rights of a member of the Communist Party. And even if the Attorney General himself would not so construe it, it is impossible to assume that persons selected for jury duty will run the risk of a charge of sympathy with Communism flowing from voting for an acquittal of so prominent a leader of the Communist Party."

The passion and hysteria which existed in the Capital had been the subject of critical press comment (R. 31).

To a large extent this attack upon progressive ideas, and the men and women who espoused such ideas, had been made by the Committee itself. Citizens had been vilified by that Committee as "disloyal" and "subversive" without any opportunity to defend themselves or obtain the rudimentary elements of justice to which they are entitled. Employees of the Government had been discharged without the opportunity to face their accusers or know the nature of the charges against them. Cries of "disloyal", and "subversive" poured forth from the halls of Congress, from the Executive Department, from the Thomas-Rankin Committee, accompanied by espionage upon citizens, wire tapping, terrorization, and every form of political intimidation (R. 31 et seq.).

In *Crawford v. United States*, 212 U. S. 183 (1909), a Government employee was held disqualified to sit as a juror. This Court stated (p. 197):

"It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

While *United States v. Wood*, 299 U. S. 123 (1936), upheld the right of Government employees to sit as jurors, where no reason was shown to forbid them from sitting, it is significant that this Court referred to the "special and exceptional case" (p. 150) where an employee might be apprehensive of the termination of his employment in case he decided in favor of the accused in a criminal case.

It is submitted that such a special and exceptional case does exist here and the rule of the *Crawford* case should apply. The Executive Order is specifically directed to

Government employees. Under the terms of this unlawful Order, and the announcement of a blacklist of over a million names, no Government employee in this case could be held to be as a matter of law an unbiased juror. The petitioner was therefore deprived of a fair trial by an impartial jury.

VIII

The Committee on Un-American Activities was not in fact a committee of the House of Representatives in that it did not consist exclusively of members of that House, but included one John E. Rankin, who, although purporting to act as a Representative from the State of Mississippi, was not, under Section 2 of the Fourteenth Amendment to the Constitution of the United States and the laws enacted pursuant thereto, authorized so to act or to exercise any of the powers or prerogatives of a member of the House of Representatives.

The gravamen of the offense charged by the indictment is an alleged willful failure on the part of the petitioner to obey a summons of a Committee of the House of Representatives. An essential part of the offense charged then is the existence of a duly constituted Committee of the House of Representatives whose summons petitioner allegedly failed to obey; one which fulfills at least the primary prerequisite for the constitution of such a Committee and consists exclusively of members of Congress.

Petitioner was under no obligation to appear before a group composed of a mixture of members and non-members of Congress. It is unthinkable that such a conglomeration of individuals could possess the enormous authority of a Congressional Committee. For it is axiomatic that the powers granted to Congress under the Constitution can be exercised only by members of Congress, chosen in accordance with the provisions of that document (United States Constitution, Art. 1, Sec. 2). And the entire theory behind the creation of Congressional Committees is that certain

functions of each House may properly be devolved upon "a Committee of its members" who act in behalf of and are bound by the limitations of the chamber to which they belong (*Barry v. U. S. ex rel. Cunningham*, 279 U. S. 597, 613, 73 Law Ed. 867 (1929)).

Nevertheless, the District Court refused even to inquire into the merits of petitioner's allegation that this so-called Committee did not in fact consist of members of Congress. Petitioner based his allegation on the provisions of the Constitution of the United States governing the structure and composition of the House of Representatives. By appropriate motions and offers of proof made before, during and after trial, he sought to demonstrate that the Committee did not, in fact, consist exclusively of members of the House as that term is defined in the Constitution.

The Court below did not contest the conclusion advanced by the petitioner. It simply declined to consider it at all. In so doing, the Court committed grave and palpable error.

Discussion throughout the nation and in the Halls of Congress after the Civil War centered about the proposals for amending the Constitution to change the basis for apportionment. It was that problem which received the primary attention of the Joint Committee on Reconstruction, popularly known as the Committee of Fifteen, and formed the subject of their first report. Following that report, the Congressional debate revolved around two essential positions. On the one hand, it was urged that Representatives should be apportioned on the basis of the number of voters in each State. On the other, many argued for an Amendment which would eliminate from the total population all persons of any race or color when the right to vote of any individual of that race or color was denied or abridged within any State.

The purpose of these proposals was two-fold: firstly, to relate the political power of any State to the degree to which political liberty was extended to its inhabitants, and secondly, to encourage the extension of the franchise to the Negro people in the South. These objectives were

constantly reiterated during the course of the debates in Congress (Congressional Globe, 1866, p. 379).

The debate was resolved by the adoption of the Fourteenth Amendment, the second section of which provides:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This section stands today as the only guide to the constitutional composition of the House of Representatives. It is the only lodestone in our basic law for determining whether individuals from any state are entitled to sit in the House of Representatives.

It is against that guide, that lodestone, that the right of persons purporting to exercise the authority of members of Congress must first be tested, for no one can even reach the stage of qualifying as a member of the House unless a seat is provided for him under this section. It is in the light of that guide that we must examine the status of John E. Rankin who, presuming to act as a Representative in Congress from the State of Mississippi, was a member of the so-called Committee which issued the summons to the petitioner in this case.

Congress has purported to grant to the State of Mississippi seven seats out of a total of 435 in the House of Representatives (World Almanac, 1947, p. 182). This allocation was based upon a consideration only of the total

population of that state undiminished to any extent by the proportion which the number of adult male citizens whose right to vote was denied or abridged bore to the total number of adult male citizens in that State.

Yet the irrefutable fact is that a wholesale abridgment of the right to vote has consistently occurred in Mississippi. At the time of the appointment of seven representatives to that state, as well as at the time of the election of John E. Rankin to the Eightieth Congress, the Negro people of Mississippi were uniformly denied the right to vote.

Of course, it is no longer open to question that the denial of the right to vote in primary elections in any state, such as Mississippi in which the primary is the determinant of the final election, falls within constitutional provisions pertaining to the right of suffrage (*U. S. v. Classic*, 313 U. S. 299 (1941); *Smith v. Allwright*, 321 U. S. 649 (1944)). And as the Report of the Senate Committee to Investigate Senatorial Campaign Expenditures in 1946, which inquired into the campaign, nomination and election of Theodore Bilbo, points out, the responsible officials of the State of Mississippi recognized the applicability of these decisions to the primaries in that state.

The lengths to which private individuals and public officials in that State went to maintain the exclusion of the Negro people from the right to vote were vividly portrayed in the evidence presented at the hearings held by that Committee as well as in the report itself. They indicate how state laws governing qualifications for voting were discriminatorily applied so as to eliminate Negroes from the exercise of voting rights, how officials have so applied literacy and educational requirements as to bring about disqualification of Negroes, how insurance against any effort on the part of the Negro people to exercise their right to vote was brought about by a campaign of terror and threats of violence on the part of prominent citizens of the State.

The abridgment of the right of the Negro people to vote has an important effect upon the number of representatives to which Mississippi is entitled under the Fourteenth Amendment. For the total number of white males in that State is 556,157. The total number of Negro males is 528,335. The number of aliens is negligible and there is no indication that there is any appreciable difference between the proportions of Negro and white males who are over the age of twenty-one years. It follows that for purposes of apportionment under the Fourteenth Amendment the figures as to total population of Mississippi should have been reduced by approximately forty-eight percent, the proportion of Negro males to the total male population of Mississippi. The number of seats in the House of Representatives to which Mississippi is entitled must, therefore, be reduced in a similar proportion. Mississippi was thus not entitled to more than four seats in that House (population figures taken from World Almanac, 1947, pp. 214-217, and reflect information secured by the census of 1940).

It is obviously impossible to say that each of the persons purportedly elected as representatives from the State of Mississippi occupies four-sevenths of a seat in the House; there is no authority for creating fractional parts of Congressional seats. Congress has not presumed to designate any of the four individuals authorized to represent the State of Mississippi in the House of Representatives. Indeed, under the Constitution no one except the qualified voters of the State of Mississippi is endowed with the authority to fill the authorized seats within that House (Constitution, Art. I, Sec. 2, Clause 1). Certainly this Court is nowhere expressly or by implication given that authority. Until the choice is made by the people of Mississippi none of the present would-be Congressmen is entitled to act in that capacity.

Thus John E. Rankin, one of the individuals purporting to act as a representative from the State of Mississippi, cannot be considered by this Court to be entitled so to

act under the terms of the Constitution. He cannot be regarded as a representative from the State of Mississippi and he cannot hold a seat in Congress otherwise than as a representative from that State. And since Mr. Rankin purported to serve as one of the members of the so-called House Committee on Un-American Activities, the Committee did not consist exclusively of duly elected members of the House and was not authorized to exercise the prerogatives of a Congressional Committee at the time petitioner was allegedly summoned to appear before it.

This Court has already construed this section of the Fourteenth Amendment (*McPherson v. Placker*, 146 U. S. 39, 36 Law Ed. 869 (1892)), and its power to do so has never been questioned. And this Court has given extensive consideration to problems relating to the apportionment of representatives among the several states and the manner of the selection of such representatives (*Wood v. Broom*, 287 U. S. 1 (1932); *Smiley v. Holm*, 285 U. S. 355 (1931); *Koenig v. Flynn*, 285 U. S. 375 (1931); *Carrol v. Becker*, 285 U. S. 380 (1931)). And here the propriety of judicial consideration of this problem is even more sharply evidenced since the fundamental liberty of a citizen depends upon it.

Nor is this case removed from the scope of judicial consideration by the prohibition against collateral attack upon the acts of a "de facto" officer. For there can be no "de facto" officer where there is no "de jure" office. It is well established that the acts of an individual who presumes to exercise the prerogatives of an office which does not constitutionally exist are wholly void and may be attacked at any time in any proceeding. As this Court declared in *Norton v. Selby County* (118 U. S. 425, 30 Law Ed. 178, 1885):

"Where no office legally exists, the pretending officer is merely a usurper to whose acts no validity can be attached".

The gravamen of petitioner's contention in this case, as we have seen, is that there was no office which John E. Rankin could fill, since there was no constitutional authority for the creation of seven seats for representatives from the State of Mississippi. The issue petitioner presents is precisely the existence of the "de jure" office and that issue may be raised whenever it affects a defendant's rights.

In any event, the basis for the prohibition against collateral attack upon the acts of a "de facto" officer is wholly lacking in this case. That prohibition is designed to protect those who in good faith have placed reliance upon the validity of such acts and to avoid the uncertainty and confusion which would result from opening to question all of the acts of a "de facto" officer who has exercised the powers of an existing office for a considerable period of time. Such a policy consideration might conceivably be relevant if petitioner were contesting the validity of a law passed by Congress upon the ground that an improperly elected representative from the State of Mississippi participated in its enactment. But it can have no relevance whatsoever where all that is being considered is the power of an individual to participate in the issuance of an order directed solely to this petitioner compelling this petitioner to take certain specific action upon pain of criminal penalties. Here the propriety of the exercise of Congressional authority and the existence of the office in question are directly involved. At this point the petitioner is affected, not as a member of the public at large, but by virtue of an order directed to him.

For much the same reason this cannot be regarded as a "political" question of such a nature as to remove it from the scope of judicial consideration. Thus the case at bar has nothing in common with the situation presented in *Saunders v. Wilkins*, 152 Fed. 2nd, 235, cert. denied 328 U. S. 80, 90 L. Ed. 1940. There the Court refused to entertain an action brought against the Secretary of State of Virginia in which the plaintiff asked damages for the Secretary's refusal to certify him as a candidate for Repre-

representative-at-Large. The basis upon which the action was brought was that the apportionment of Representatives to that State had not taken into account the requirement of the Second Section of the Fourteenth Amendment for a reduction of the number of Representatives where there had been an abridgment of the right to vote.

The issue thus presented was manifestly political. It revolved about the right of a particular individual to run for a certain office which had not been created by proper authority. The Court was asked to declare that an office of Representative-at-Large actually existed in the State of Virginia in spite of the fact that neither the Congress of the United States nor the State of Virginia had created it. The Court was requested to award damages to a private person for a purely political injury. The liberty of an individual was not at stake. The Court was not being asked to apply the provisions of the Constitution to protect a defendant from an unjust prosecution.

In the present case, however, the situation is precisely reversed. Here the Court is not asked to direct the Congress or the State of Mississippi to do anything. This Court is not asked to reduce the number of representatives from the State of Mississippi, to designate the manner in which representatives shall be selected, or to choose which representatives are the proper ones from that state. The decree of this Court will not even compel Congress to cease acting in violation of the Constitution or to refrain from seating more representatives from the State of Mississippi than that document permits. This Court is simply asked to decline to comply with a Committee's insistence that the petitioner be sent to prison upon the basis of his alleged refusal to heed the summons of that Committee, among whose members was a bald usurper of the mantle of a Congressman.

It is realized that the violation of the Fourteenth Amendment by the State of Mississippi and by other states in our Union has been countenanced for a long time. But "general acquiescence cannot justify departure from the law" (*Smiley v. Holm, supra*). To justify a refusal to apply the Fourteenth Amendment because for many years its violation has been tolerated is to write into our law a doctrine that constitutional limitations can be repealed by ignoring them. To refuse to apply the Second Section of the Fourteenth Amendment because Congress has chosen to forget about its existence is to destroy the fundamental idea that this is a government of laws and not of men.

Congress has chosen to ask this Court to put the petitioner in prison because he allegedly ignored the summons of a group of men purporting to act as a Committee of Congress. But this petitioner was never under a legal obligation to obey the orders of such a group of men unless they constituted in fact a committee composed of members of Congress. And it is the solemn duty of this Court to protect the liberty of the petitioner ~~against~~ invasion by a group which had no constitutional authority to summon him.

The Court is not asked to overrule Congress or to enjoin the operation of a congressional function. All this Court is asked to do is to state that if Congress does not abide by its constitutional obligations, it cannot involve the judicial branch of the government as a partner in its wrongdoing. It cannot secure a judicial blessing for the avoidance of its responsibilities.

CONCLUSION

The decision of the Court of Appeals involves important questions of federal law which have not been but should be settled by this Court. Federal questions have been decided in a way probably in conflict with applicable decisions of this Court. The questions raised are ones of substance and general importance. Wherefore, the petitioner prays that a writ of certiorari issue to the Court of Appeals District of Columbia Circuit to review its judgment and decree.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, ~~1948~~ '49

No. ~~436~~ 14

EUGENE DENNIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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INDEX

	PAGE
I—The jury issue	1
II—The validity of the statute creating the Committee on Un-American activities	6
III—The issue of judicial participation in the violation by Congress of Section 2 of the Fourteenth Amendment	8
IV—The issue of wilfulness and the exclusion from the evidence of petitioner's explanation for his non-appearance	10
V—The issue of the service of the subpoena	11
VI—The Government's avoidance of the other issues raised in the petition	11
Conclusion	12

CITATIONS

Cases:

Alford v. United States, 282 U. S. 687	6
Fields v. United States, 164 F. 2d 97 (App. D. C.), cert. den. 332 U. S. 851	10
Frazier v. United States, Dec. 20, 1948	2, 3, 5
Hall, In re, 296 Fed. 780 (S. D. N. Y.)	11
Lovell v. Griffin, 303 U. S. 444	7
McGrain v. Daugherty, 273 U. S. 135	7
Norris v. Hassler, 23 Fed. 581 (C. C. D. N. J.)	11
Sinclair v. United States, 279 U. S. 263	7
Smith v. Cahoon, 283 U. S. 553	7
Thomas v. Collins, 323 U. S. 516	8
Wilder v. Welsh, 1 MacArthur 566 (Sup. Ct. D. C.)	11
Yakus v. United States, 321 U. S. 414	8

Miscellaneous:

Executive Order 9835	2, 3, 4, 6
Meikeljohn, Alexander, Free Speech and Its Relation to Self-Government (N. Y., 1948)	7

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PETITIONER'S REPLY BRIEF

I

The Jury Issue.

The Government's brief (pp. 13-15) misconceives the nature of petitioner's challenge to all talesmen who were government employees. The petitioner contends that he was deprived of a fair and impartial trial in violation of the Sixth Amendment because the government employees, under the circumstances of this case, were disqualified as a matter of law from serving as members of this jury. The issue here, therefore, is not whether government employees may in general sit in judgment in cases prose-

cuted by the Government, nor whether opportunity was afforded counsel to inquire on voir dire into the juror's prejudices. The issue is: May government employees subject to the terms and provisions of Executive Order 9835 serve upon a jury in a criminal trial prosecuted by the Government for contempt of the House Committee on Un-American Activities, where the action has been initiated by the House Committee on Un-American Activities and the defendant is the General Secretary of the Communist Party? The Government's brief in opposition appears to have overlooked the following considerations:

a) In *Frazier v. United States*, decided by this Court on December 20, 1948 (four Justices dissenting), a case involving a violation of the Narcotics Law, the sole issue before the Court was whether government employees, without more, could be disqualified from sitting on a jury in a criminal case prosecuted by the United States. The situation here is far different. Here something more, of a drastic nature, did occur. On March 21, 1947, the President of the United States issued Executive Order 9835 "Prescribing Procedures For The Administration of An Employees Loyalty Program In The Executive Branch Of The Government." Investigation of the loyalty of all government employees was ordered with the specific requirement that among the "pertinent sources of information" to which the investigators were to refer were the "House Committee on Un-American Activities files" (Executive Order 9835, Part I, Section 3e). The activities and associations of government employees which could be considered in connection with the determination of disloyalty included the following:

"Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as

having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means" (Executive Order 9835, Part V, Section 2f).

When there is considered under what circumstances Executive Order 9835 was issued (R. 31 et seq.) and the wide publicity which surrounded the loyalty investigations of government employees (see Andrews, B., *Washington Witchhunt*, 1948); when there is considered the enormous consequences to government employees which flow from the finding of disloyalty under Executive Order 9835; when the testimony of the Chairman of the House Committee on Un-American Activities, John Parnell Thomas, is recalled with his "subversive list" of over a million names (R. 189) and the Committee's rule permitting "agents of the Government to come and see our files"—it appears clear that no government employee could be a "fair and impartial" juror within the intendment of the Constitution. As Mr. Justice Jackson stated of government employees in the *Frazier* case:

" . . . Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger

in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to " . . . crook the pregnant hinges of the knee where thrift may follow fawning."

b) In the light of the above, it is clear that no amount of inquiry by counsel nor assurances given by the talesmen could remove the bias inherent in these proceedings. It is unreasonable to assume that any government employee would ever admit his belief that any action taken by him at the trial would subject him to a loyalty investigation. The significant facts are that a majority of the jury were composed of government employees subject to the Loyalty Order; that the charge in the indictment was contempt of the House Committee on Un-American Activities; that the jury were so reminded by the Court and the United States Attorney throughout the trial; that the Chairman of the Committee and another member, Karl E. Mundt, as well as the Chief Investigator, Robert E. Stripling, testified before the jury; and the jury knew and were informed time and again that the defendant was a principal officer of the Communist Party. Under these circumstances was it reasonable to assume that a government employee could render a "fair and impartial" verdict? If he held out for a verdict of acquittal, how could he ever be sure that a fellow juror would not report that fact to his agency, especially when under Executive Order 9835 "an investigative agency may refuse to disclose the names of confidential informants" (Part IV, Section 2). The case here presents the "combination of circumstances" to which the majority of this Court referred in the

Frazier case. Indeed, "the cards were stacked from the beginning."

The Government's argument that "the jurors were carefully questioned to determine that there was no bias" (p. 15) overlooks the events which occurred at the trial. Shortly after the jury was sworn, an alternate juror asked leave to speak to the Court (R. 125). He informed the Court and counsel that "this jury was sitting at the *Barsky* trial as spectators, more or less, and they heard, I think, this very argument that we were expelled from the room for—the question of law as to whether the Committee had the right to issue a subpoena" (R. 126). As counsel for the petitioner reminded the Trial Court (R. 128), not one juror had volunteered the information that he had listened to the arguments in the *Barsky* case, despite the fact that they had been, as the Government asserts, "extensively questioned on the voir dire for any signs of prejudice" (p. 14). To assume under such circumstances that a government employee would reveal his fear of the impact of Executive Order 9835 upon his verdict is to flout reality and arbitrarily determine impartiality where none can exist. Indeed, government employees ought not to be required under such circumstances to have to search their consciences to determine their ability to withstand the pressures to which such an order subjects them, consciously and subconsciously. Clearly, in a case such as this, the strong possibility of fear and bias on the part of government employees is sufficient to disqualify them within the purview of the Sixth Amendment.

c) Moreover, the House Committee on Un-American Activities, as the Court advised the jury (R. 335), was allegedly engaged in investigating "subversive" and "Un-American" propaganda. Basically, its inquiry was directed to the loyalty of citizens and the peti-

tioner, the General Secretary of the Communist Party, was charged with contempt of the said Committee. With such terms as "sympathetic association", "subversive", and "disloyal" completely undefined, no government employee could be sure that his verdict of acquittal would not enmesh him in the web of Executive Order 9835.

It is submitted that the issue here is one of great public importance involving as it does a basic aspect of the administration of justice in the federal courts and should be passed upon by this Court. If it is error to refuse to permit an inquiry upon cross-examination as to where a witness lives for the purpose of showing to a jury that the witness is under detention by the Government and therefore biased (*Alford v. United States*, 282 U. S. 687, 1931), it is clear error, it is submitted, for government employees, subject to the terms of Executive Order 9835, to sit in judgment in an action where a verdict of acquittal may be tantamount in the opinion of government officials to evidence of disloyalty.

II

The validity of the statute creating the Committee on Un-American Activities.

The Government declines to meet the petitioner on the merits of this issue (pp. 8-9). We respectfully refer the Court to our arguments contained in the petition for the writ of certiorari and the brief in support thereof (pp. 13, 16-19, 26, 28-29, 30-35). The Government does not deny the public importance of the issue nor does it disagree with the view that "there is a serious need for this Court to exercise its historic function of interpreting the fundamental document" (pet. p. 17). To the many voices cited in our petition (p. 17) calling for a determination

by this Court of the fundamental issue herein involved we would add the voice of Alexander Meikeljohn in his recent treatise, *Free Speech and Its Relation to Self-Government* (N. Y. 1948):

"May a teacher venture to suggest that the time has come when the court, as teacher, must declare, in unequivocal terms, that no idea may be suppressed because someone in office, or out of office, has judged it to be 'dangerous!'"

The argument that the petitioner is without standing to challenge the authority of the Committee is without merit. The gravamen of the Government's entire brief appears to be that the petitioner may not challenge the authority of the Committee and yet may be convicted for resisting its authority. The decisions of this Court are to the contrary.

In *McGrain v. Daugherty*, 273 U. S. 135 (1927), the witness failed and refused to appear after subpoenas served upon him, but this Court did not doubt the right of the witness to raise the question of the authority of the Committee when he was arrested and tried, although the question was decided against him. This Court stated that the two Houses of Congress are not "invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied" (p. 173). See also, *Sinclair v. United States*, 279 U. S. 263 (1929).

Where a statute which requires the issuance of a license to carry on a business is invalid on its face, a person is not required to make an application for such a license in order subsequently to raise the question, but he may disobey the statute and raise the invalidity of the statute in an action brought to enforce its penalties. *Smith v. Cahoon*, 283 U. S. 553, 565 (1931). The rule is the same in free speech cases, *Lovell v. Griffin*, 303 U. S. 444 (1938). "As the ordinance is void on its face, it was not necessary for appellant

to seek a permit under it. She was entitled to contest its validity in answer to the charge against her" (p. 452).

An order of a Court restraining a union organizer from soliciting membership in a union without first obtaining an organizer's card as required by a state statute was disobeyed by the union organizer. This Court, in upholding his contention that the order was unconstitutional, decided that the organizer was within his rights in disobeying the decree of the Court. *Thomas v. Collins*, 323 U. S. 516, 536 (1946).

Nor does the statute here provide any remedy by which the appellant could judicially test the validity of the process served upon him. Compare, *Yakus v. United States*, 321 U. S. 414, 437 (1944). Under these circumstances, to deny him his constitutional defenses to this criminal prosecution would be a deprivation of his liberty without due process of law.

III

The issue of judicial participation in the violation by Congress of Section 2 of the Fourteenth Amendment.

Here, again, the Government declines to meet the issue (p. 9). More important, the Government misstates the issue. The issue here is not the failure of Congress to exercise the power conferred upon it by Section 2 of the Fourteenth Amendment. The real issues are presented in the petition herein (pp. 15-16) to which this Court is respectfully referred. The issue is whether the judicial arm of government may become a party to a patent violation of Section 2 of the Fourteenth Amendment by the positive action of imprisoning the person who raises the issue. The issue is whether a person in jeopardy of his liberty through a charge of contempt of a committee partly composed of men seated in Congress in violation of Section 2

of the Fourteenth Amendment can be denied before the Court trying him for his freedom, the opportunity to offer proof that the Committee is without lawful authority; whether there exists no element of due process that may be claimed in court by a person against whom a Congressional committee so constituted demands criminal penalties.

The Government's claim that the issue is "political" and "collateral" is answered in our petition and brief (pp. 23-25, 43-51). The petitioner in the Trial Court was not attacking the apportionment of representatives as a member of the public at large. He was being subjected to an immediate, a direct, a present injury resulting from the violation of the Constitution. He was being subjected to criminal prosecution and he faced a present threat to his liberty. There was nothing "collateral" or "political" about the issue as it was presented to the Trial Court. In refusing the petitioner any opportunity to present proof to the jury that the Committee on Un-American Activities was without lawful authority to demand criminal penalties against the petitioner, the Trial Court gave judicial approval to the nullification of Section 2 of the Fourteenth Amendment and the imprisonment of the person who had raised the question. We submit that this was error, as was the decision of the Court of Appeals upholding the ruling of the Trial Court, a decision to which the Government understandably does not refer. For the latter decision encourages the continued monstrous nullification of the Fourteenth Amendment in asserting that Congress may with impunity ignore the provisions of Section 2.

IV

The issue of wilfulness and the exclusion from the evidence of petitioner's explanation for his non-appearance.

The Government's reliance upon *Fields v. United States*, 164 F. 2d 97 (App. D. C.), cert. den. 332 U. S. 851, appears misplaced. The authorizing statute there did not involve, as it does here, a vague and undefined power to inquire broadly into propagation of ideas (see the discussion in petition and brief, pp. 23, 36-38).

The Government attempts to justify the exclusion from the evidence of petitioner's explanation for his non-appearance by stating, first, that it "was not really an excuse for non-attendance; it was in reality a challenge to the legality of the Committee" (p. 11), and, second, that under the construction of the term "wilful" by the Trial Court, the "letter was clearly irrelevant" (p. 11). Were we to concede the premises upon which the Government bases its arguments, its contentions must nevertheless fail. Even under the most narrow construction of the word "wilful", the petitioner's explanation for his non-appearance was clearly relevant. The Government charged that the petitioner had wilfully defaulted in appearance before a lawfully constituted committee. The petitioner asserted in his communication that he had no intention "to ignore the authority of any lawful congressional body" (R. 396). It was his intention to challenge the authority of an unlawfully constituted body. Whether his *intention* was to ignore the authority of a lawful body, or to challenge the authority of an unlawful group, was an issue for the jury to decide, and upon that issue, his written explanation was clearly material and relevant.

V

The issue of the service of the subpoena.

The Government fails to distinguish the case of *Wilder v. Welsh*, 1 MacArthur 566 (Sup. Ct. D. C.), relied upon by the petitioner, nor does it reply to the arguments contained in his petition and brief (pp. 19-20, 38-39). *In re Hall*, 296 Fed. 780 (S. D. N. Y.), cited by the Government in its brief (p. 13), is contrary to its position. Article I, Section 5 of the Constitution deals only with the power of each House to compel members to attend its sessions when less than a quorum is present. *Norris v. Hassler*, 23 Fed. 581 (C. C. D. N. J.), is not in point. Petitioner was not subpoenaed to testify in the same matter as to which he was already in attendance. The importance of a ruling by the Court on this question is enhanced by the increased utilization of Congressional committees as roving investigatory bodies.

VI

The Government's avoidance of the other issues raised in the petition.

There is one basic issue which the Government appears studiously to have avoided in this proceeding. The issue is embodied in Questions 9 and 10 in the petition (p. 14) and in the subsequent discussion (pp. 22-23, 35-36). The petitioner was not afforded the elements of a judicial trial. His counsel was permitted to make no opening statement; he was not permitted to cross-examine; all the pertinent evidence which he offered to prove was rejected; virtually all his prayers for instructions were denied. There was here complete deprivation of liberty without due process of law. Upon an issue of such magnitude, the Government has no comment.

CONCLUSION

On this application, counsel have intentionally refrained from commenting upon the obvious infirmities in the opinion of the Court below with respect to the legal acumen displayed to lack of judicial disinterestedness revealed in the gratuitous comments upon the personality of the defendant and the arguments of counsel and the general tenor and ungrammatical and unrhetical presentation of the opinion of the Court. Counsel advert to this only that they may not be accused of having overlooked these weaknesses in the Court's opinion. On the contrary, counsel have limited themselves solely to the basic questions involved in the prosecution and the decision of the lower Court.

The Government does not deny that the decision of the Court of Appeals involves important questions of federal law which have not been but should be settled by this Court. It does not deny that the questions raised are ones of substance and general importance. The prayer for the issuance of a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 14

EUGENE DENNIS,

Petitioner,

v.

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA.**

BRIEF FOR PETITIONER

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INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT	2
SPECIFICATION OF ERRORS TO BE URGED	11
SUMMARY OF ARGUMENT	11
ARGUMENT	14
INTRODUCTORY NOTE	14
I—Principles governing the qualifications of prospective jurors who are government employees	16
II—The circumstances of this case made it inappropriate for federal employees to serve on the jury	23
III—Because of the "loyalty" programs and campaigns of which they have been victims for a 10-year period, government employees could not properly serve as jurors in this case	31
(A) The House Committee on Un-American Activities	32
(B) Attacks upon employee loyalty by government agencies other than the House Un-American Activities Committee	38
(C) Executive Order 9835	42
IV—No justification exists for sustaining the decision below	50

	PAGE
CONCLUSION _____	55
APPENDIX _____	61
1. United States Constitution, Article III, Section 2, Paragraph 3 _____	61
2. United States Constitution, Amendment VI _____	61
3. Section 121(b), Legislative Reorganization Act of 1946 _____	61
4. Executive Order No. 9835 _____	63

CASES CITED

Anderson v. Todd Shipyard Corp., 63 Fed. Supp. 229	19
Ballard v. U. S., 329 U. S. 187 _____	58
Barsky v. U. S., 167 F. (2d) 241 (App. D. C.) _____	36
Bryan v. U. S., 174 F. (2d) 525 (App. D. C.) _____	14
Bushell's Case, 1 Vaughn, 135 _____	30
Crawford v. U. S., 212 U. S. 183 _____	11, 13, 16, 17, 18, 50, 51
Eisler v. U. S., decided April 18, 1949 dissenting opinion _____	49
Fay v. N. Y., 332 U. S. 261 _____	59
Fleischman v. U. S., 174 F. (2d) 519 (App. D. C.) _____	15
Frazier v. U. S., 335 U. S. 497 _____	11, 12, 13, 16, 20, 21, 22, 23, 24, 25, 27, 50
Hillyard v. State, 116 Tex. Cr. 557 _____	52
I.A.M. v. Labor Board, 311 U. S. 72 _____	27, 29
Lane v. State, 168 Ark. 528 _____	52
Lawson v. U. S., 176 F. (2d) 49 (App. D. C.) _____	15

	PAGE
McNabb v. U. S., 318 U. S. 332	59
Marshall v. U. S., Case No. 9864 (App. D. C.), decided June 29, 1949	15
Miller v. U. S., 33 App. D. C. 361	79
Morford v. U. S., 176 F. (2d) 54 (App. D. C.)	15
Murphy v. Extraordinary and Special Term, 294 N. Y. 440	54
National Labor Relations Board v. Donnelly Garment Co., 330 U. S. 219	52
Temple v. State, 15 Okl. Cr. 176	51, 52
Trumbo v. U. S., 176 F. (2d) 49 (App. D. C.)	15
United Public Workers v. Mitchell, 330 U. S. 75	53
U. S. v. Burr, 25 Fed. Cas. No. 14693	51
U. S. v. Chapman, 158 F. (2d) 417 (C. C. A. 10)	51
U. S. v. Johnson, 323 U. S. 273	54
U. S. v. Josephson, 165 F. (2d) 82 (C. C. A. 2)	35
U. S. v. Lovett, 328 U. S. 303	30, 31, 34
U. S. v. Wood, 299 U. S. 123	1, 12, 13, 16, 18, 19, 20, 21, 22, 23, 24, 25, 27, 47, 50, 53
Washington et al. v. Clark et al., 84 Fed. Supp. 964	47
Young v. Marine Ins. Co., 1 Cranch C. C. (1 D. C.) 452, Fed. Cas. No. 18163	19

STATUTES, REGULATIONS AND RELATED MATERIAL

	PAGE
Civil Service Commission Departmental Circular No. 222, June 20, 1940.....	38
Committee on the Civil Service, Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79th Congress, 2nd Session (1946) ..	41
Cong. Record, 79th Cong., 2nd Sess., Daily Appendix 740 (1946).....	34
83 Cong. Record 7570 (1938)	33
89 Cong. Record 4581 et seq. (1943).....	40
91 Cong. Record 275 (1945)	33
92 Cong. Record 5217 (1946)	33
93 Cong. Record 3815 (1947)	24
Department of Justice Appropriation Act (1942).....	40
Department of State Regulations pursuant to Title 50 U. S. Code App., Sec. 1156 (1946).....	39
Executive Order No. 9806, 11 Fed. Reg. 13863 (1946) ..	41
Fed. Reg. 7723, Sec. 18.2(c) (1942).....	39
Hearings before Special Committee to Investigate Un-American Activities, Vol. 9 (1939), p. 5448.....	33
Hearings before Committee on Post Office and Civil Service in H.R. 3588, 80th Cong., 1st Sess. (1947).....	40
House Report No. 2, 76th Cong., 1st Sess. (1939).....	33, 34
House Report No. 1, 77th Cong., 1st Sess. (1941).....	33
House Report No. 2748, 77th Cong., 2nd Sess. (1943) ..	32
House Report No. 2277, 77th Cong., 2nd Sess. (1942) ..	34

House Report No. 2233, 79th Cong., 2nd Sess. (1946)	34
House Report Committee on Civil Service, 79th Cong., 2nd Sess. 6 (1946)	41
Senate Rep. No. 1304, 76th Cong., 3rd Sess., 1 Senate Miscellaneous Reports, 76th Cong., 2nd and 3rd Sessions (1940)	45
Title 2, U. S. Code, Sec. 192	4, 14
Title 18, U. S. Code, Sec. 61, 1946 (Hatch Act)	25, 38
Title 50, U. S. Code App., Sec. 1156 (1946)	39
United States Constitution:	
Art. I, Sec. 9, Cl. 3	53
Art. III, Sec. 2, Cl. 3	54, 59
Amendment VI	37, 54, 57, 59

TEXTS, BOOKS, ARTICLES AND MISCELLANEOUS

31 <i>American Jurisprudence</i> , "Jury," Secs. 109, 110	50
Andrews, <i>Washington Witch Hunt</i> (1948)	29, 36, 39, 49
Bacon's <i>Abridgment</i> III	55
Bentham, <i>The Elements of the Art of Packing</i> (1821)	55
<i>Blackstone's Com.</i> Bk IV	56
Chafee, <i>Free Speech in the United States</i> (1941)	58
<i>Coke on Littleton</i> , I, 115 a (d) 156	37, 55
Commager, Prof. Henry Steele, "Who is Loyal to America?" <i>Harper's Magazine</i> , September, 1947	34, 47
Duncombe, Giles, <i>Trials per Pais</i> (9th ed. 1793)	28
Elliot's <i>Debates</i> (2d ed.) II, III, IV	57, 58
Emerson and Helfeld, "Loyalty Among Government Employees," 58 <i>Yale L. J.</i> 1 (1948)	42, 44

	PAGE
Erskine, Thomas, <i>The Trial of Stockdale</i> (1790).....	56
Forsythe, <i>The History of Trial by Jury</i> (2nd ed.).....	56
Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39 Harv. L. Rev. 917.....	55
Gelhorn, Martha, "Cry Shame", New Republic, October 6, 1941.....	36
Hume, David, <i>History of England</i> (n. d., Lowell ed.)....	57
Lerner, Max, "Freedom: Image and Reality" in <i>Safe- guarding Civil Liberty Today</i> (1945).....	37
Lesser, <i>Historical Development of the Jury System</i> (1894)	56
May, <i>Constitutional History of England</i> (1899).....	56
New Republic, July 14, 1947.....	49
New York Post, March 7, 1949, "The Case of Mr. N.".....	49
New York Times, June 10, 1940.....	32
New York Times, October 8, 1947.....	39
New York Times, October 20, 1941.....	33
O'Brian, John Lord "Loyalty Tests and Guilt by Asso- ciation", 61 Harv. Law Rev. 592.....	45
Osborn, <i>The Mind of the Juror</i> (1937).....	52
Phillips, <i>Powers and Duties of Jurors</i> (2nd ed.).....	56
Pollock and Maitland, <i>History of English Law</i> (1923)	55
Pound, <i>Law and the Administration of Justice</i> (1947)	58
President's Committee on Civil Rights, <i>To Secure these Rights</i> (1947).....	36

	PAGE
President's Temporary Commission on Employee Loyalty, Report of (1947).....	40
Rogge, <i>Our Vanishing Liberties</i> (1949).....	49
Rosenzweig, "The Law of Wire Tapping", 33 Cornell Law Quarterly 93.....	45
Sancton, "Dossier for the Millions" The Nation, Sep- tember, 1948.....	49
Stone, I. F., The Nation, November 8, 1947.....	36
von Moschzisker, "Historic Origin of Trial by Jury", 70 U. of Pa. L. Rev. 1, 85.....	56
Wharton, <i>Criminal Procedure</i> (1918 ed.).....	52

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals is reported in 171 F. (2d) 986. No written opinion was rendered by the trial court on the issues involved herein. See 72 Fed. Supp. 417.

Jurisdiction

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 317). By order dated October 30, 1948, Chief Justice Vinson extended the time for filing the

petition for writ of certiorari to November 29, 1948 (R. 419). The petition was filed on November 27, 1948, and was granted on June 27, 1949 (337 U. S. 954), limited to the question whether government employees could properly serve on the jury which tried petitioner. The jurisdiction of this Court rests upon 28 New United States Code, Section 1254.

Constitutional Provisions, Statutes and Executive Order Involved

The following constitutional provisions, statutes and Executive Order are set out in the Appendix to this brief:

1. Constitution, Article III, Section 2, Paragraph 3.
2. Constitution, Amendment VI.
3. Section 121(b), Legislative Reorganization Act of 1946.
4. Executive Order No. 9835.

Statement

The petitioner, Eugene Dennis, is the General Secretary of the Communist Party of the United States (R. 165). The indictment (R. 3-4) under which he was convicted charged that the petitioner "having been duly summoned and served as a witness by the authority of the House of Representatives through its Committee on Un-American Activities" (R. 4), wilfully defaulted in appearance in violation of Section 192 of 2 United States Code. These criminal proceedings against the petitioner were initiated by the House Committee on Un-American Activities pursuant to the provisions of Section 194 of 2 United States Code (Govt's Exhs. 5, 6, 7, R. 373-378).

The case against the petitioner was called for trial on June 23, 1947 (R. 333). During the course of the argument

on a motion for continuance, the prosecutor stated (R. 39): "Our office looks on it as an important case, the Department of Justice looks on it as an important case, and I know the gentlemen on the Hill before whom the contempt took place look on it as an important case".

Pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure, the petitioner moved for a transfer of the case to another District upon the ground that there existed in the District of Columbia a prejudice so great against the petitioner that he could not obtain a fair and impartial trial (R. 27). In his affidavit in support of the motion for transfer (R. 27-32), the petitioner maintained that he could not obtain a trial by "an impartial jury" in the District of Columbia, if government employees were permitted to serve. The petitioner stressed that government employees were subject to the provisions of Executive Order 9835, 12 Fed. Reg. 1935 (1947) providing for the discharge from government employment of any person concerning whom there was "reasonable grounds . . . for belief that . . . (he) . . . is disloyal to the Government of the United States". Among the "activities or associations which may be considered in connection with the determination of this loyalty", the Executive Order included "sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as . . . Communist" (R. 28). The petitioner urged that the consequence which flowed from the Executive Order made it impossible for him, "a leader of the Communist Party" (R. 28), to secure a fair and impartial trial, "particularly when the charge against him is laid by the Committee on Un-American Activities" (R. 28). Reviewing the onerous requirements of the Executive Order: the penalties which fell upon Government employees who displayed undefined "sympathetic association" with members of the Communist Party (R. 29); the demands by members of the House Committee on Un-American Activities on the floor of Congress for immediate prosecution and conviction of the petitioner (R. 29);

the widespread fear which had been engendered among government employees in the District of Columbia by the conduct of such agencies of Government as the House Committee on Un-American Activities, the Federal Bureau of Investigation, and the Department of Justice, "a police state atmosphere in which neither justice nor free speech can be assured" (R. 32), the petitioner urged upon the trial court that "a fair trial in accordance with the established American traditions and the Constitution of the United States" (R. 32) would be impossible if government employees were required to serve as jurors in the trial of the cause. The motion for change of venue was denied at the opening of the trial, just prior to the examination of the jurors on voir dire (R. 41).

The first twelve jurors having taken their seats in the jury box (R. 46), the prosecutor identified the case, in part, as follows (R. 47-48):

"The defendant is charged with violation of Title 2, Section 192, of the United States Code. He is charged with having been guilty of contempt of the House of Representatives. The indictment states in detail that on April 9th, of this year, after he had been previously summoned by a committee of the House of Representatives, known as the Committee on Un-American Activities, to be present and give testimony before that committee on that date, and that he made wilful default.

The Government expects to call in support of the case all or some of the following witnesses: First, Congressman John Parnell Thomas, of New Jersey. He is the gentleman standing by the wall; Congressman Karl Mundt. Congressman Mundt is expected to be here. And also Robert Stripling, Chief investigator of the House Un-American Activities Committee. Also Mr. Edward K. Nellor."¹

Counsel for the petitioner challenged all government employees for cause (R. 64). The Government replied:

¹ Mr. Nellor was identified in the record as the Washington correspondent for the New York Sun (R. 242).

"It has never been done, your Honor, to challenge government employees as such" (R. 65). The trial court added: "Not since the law was amended" (R. 65), and overruled the challenge (R. 65).

Three peremptory challenges were available to each side (District of Columbia Code, Title 23, Sec. 107). The petitioner exhausted his peremptory challenges (R. 95), exercising two of the three against government employees (R. 51, 82, 54, 71). The Government exercised two of its three peremptory challenges against non-governmental employees (R. 69, 79). Of the jurors finally selected (R. 105), seven were government employees. Juror Grant had been employed for about 29 years in the "City Post Office" as a letter carrier (R. 55). His son was employed by the Bureau of Standards (R. 57). Juror Grigsby was a card punch operator in the Navy Department, Supplies and Accounts Branch (R. 56). She had been employed for about four and a half years (R. 56). Juror Helford was a clerk in the Department of Commerce (R. 67) with a cousin that worked for the Navy (R. 68). Juror Jones was a Post Office clerk, employed for two or three years (R. 76). Juror Mackall was a carrier in the Post Office Department, so employed for 20 years (R. 83). His wife was "with the D. C. Government" (R. 83). Juror Neff was with the Naval Gun Factory (R. 89). He had been in the employ of the Government for about 12½ years (R. 89). Juror Parham was in the employ of the Government Printing Office (R. 92). He had been with the Government about 25 years (R. 92). All of the jurors expressed the belief that they could render a fair and impartial verdict.

The prosecutor's opening statement reminded the jury "that for some time the defendant in this case has been a member of the Communist Party" (R. 106): "• • • he was at that time and is now—the defendant—secretary of the Communist Party" (R. 107). The Committee on Un-American Activities "at that particular time was taking testimony on the activities of the Communist Party in the United States and the activities of its members • • •

was examining, under the law, general propaganda conditions of an un-American and subversive source in this country" (R. 107).

Before calling any witnesses, the prosecutor introduced into evidence, and read to the jury, the following exhibits: (a) An excerpt from the Legislative Reorganization Act of 1946 setting forth the powers of the House Committee on Un-American Activities (R. 155).² (b) House Resolution 2 attested by the Clerk of the House and under its seal attesting that the House of Representatives of the Eightieth Congress had been organized (R. 154); (c) House Resolution No. 5 renewing the authority of the House Committee on Un-American Activities (R. 155); (d) Certification from the Clerk of the House of Representatives that Congressmen Thomas, Mundt, McDowell, Nixon, Vail, Wood, Rankin, Peterson and Bonner were members of the Committee on Un-American Activities (R. 156); (e) House Resolution 193 calling upon the Speaker of the House of Representatives "to certify . . . as to the wilful, deliberate, and inexcusable refusal of Eugene Dennis . . . to appear before the said Committee on Un-American Activities . . . to the United States Attorney for the District of Columbia, to . . . be proceeded against in the manner and form provided by law" (R. 159); (f) the certification of the Speaker of the House of Representatives to the United States Attorney (R. 159); (g) copy of House Report 289 submitted "by Mr. Thomas of New Jersey from the Committee on Un-American Activities" (R. 160) set-

² The prosecutor informed the jury that the House Committee has power "to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda as instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (R. 153). The prosecutor also read to the jury the powers of the Committee to issue compulsory process for persons and papers (R. 154).

ting forth the contents of the subpoena served upon the petitioner, the return of service by Robert E. Stripling, Chief Investigator of the Committee, and the finding of the Committee that the petitioner was "in contempt of the House of Representatives of the United States" (R. 162).

John Parnell Thomas was the first witness called by the Government (R. 162). He testified that he was the Chairman of the Committee on Un-American Activities of the House of Representatives, "a standing Committee of the House" (R. 163). On March 26, 1947, when the petitioner voluntarily appeared before the Committee, there was under consideration by the Committee two bills "about whether or not the Communist Party should be outlawed in the United States" (R. 174). He had reported the default of the petitioner on April 9, 1947 to the House of Representatives (R. 174). Robert E. Stripling, the second witness, testified that he was "the clerk and chief investigator of the Committee on Un-American Activities, U. S. House of Representatives" (R. 218). When the petitioner was served with the subpoena, there were "fifty members of the press present" (R. 222). He had been present at the April 9th meeting of the Committee when Congressman Mundt presided (R. 228). In response to the inquiry as to what matters were being considered by the Committee on Un-American Activities on April 9th, he answered, "The activities of the Communist Party of the United States" (R. 230). Sound movies were taken in connection with the service of the subpoena on the petitioner by "Paramount Newsreel, Universal, and I believe it was Movietone" (R. 231). The third witness was Edward Kenneth Nellor, who testified that he was the Washington correspondent for the New York Sun (R. 242) and had witnessed the service of the subpoena. The fourth witness was Karl E. Mundt (R. 248). He testified that he was a representative from South Dakota "serving my fifth term" (R. 249). He was the next ranking member of the Committee, "next to Mr. Thomas" (R. 249), and had presided at the April 9th meeting of the Committee.

The petitioner called as a witness in his behalf Vito Marcantonio, a member of the House of Representatives serving his sixth term in Congress (R. 272). The cross-examination of the witness by the prosecutor was in the following pattern:

"Q. Among your acquaintances, how many friends do you have who are Communists?" (R. 285).

.

"Q. Among your friends and acquaintances, how many close friends do you have who are members of the Communist Party?" (R. 286).

.

"Q. Aren't you in Congress the champion of the Communist Party?" (R. 286).

.

"Q. And haven't you fought fight after fight for the Communist Party in the halls of Congress?" (R. 286).

In his opening argument to the jury (R. 298), the prosecutor stated:

"Mr. Fibelly: May it please Your Honor and you ladies and gentlemen of the jury and prospective juror: Court opened this morning with the substantial words: 'God save the Government of the United States and this Honorable Court.' Now, may the courts always be opened in this District with those words.

You ladies and gentlemen of the jury are privileged to try one of the most important cases that has ever been tried in this District, the case of the United States against Eugene Dennis, secretary of the Communist Party.

The evidence in this case shows that Dennis set himself up as the single, as the leader of the Communist Party, and believed he was bigger than and greater than and more important than the United States Government. God help us if he or anyone else, as the symbol of that party, gets away with that, if I may use the language of the street.

.

In addition to the committee having been made a standing committee, ladies and gentlemen of the jury, we have the fact as has been stated by counsel and re-emphasized in his questions to you when we were all attempting to get a fair and impartial trial jury, that the President of the United States issued a Loyalty Order, and we have all those facts to consider" (R. 300).

.

"I again say: Lord help the Government of the United States if an individual can think he is so big and so bombastic that he can make utterances like that, and defy the law, and defy the Representatives who have been elected by the citizens of this country to represent the Government of the United States" (R. 303).

In his closing remarks to the jury (R. 325), the prosecutor stated (R. 326):

"Dennis was operating on the Committee on Un-American Activities on that date and part of the Government of the United States, and by your verdict you shall tell him whether he can get away with that or whether others can get away with it or whether the law that was passed with respect to a wilful default shall be enforced in the District of Columbia where a person has been properly subpoenaed.

.

If any individual can hold himself up as greater than the Congress of the United States, then, as I say, God help Congress and God help our Government; and I know by your verdict you will say that this defendant or no one else can do so and get away with it" (R. 331).

The court charged the jury (R. 331), in part, as follows (R. 334-335):

"In this case the defendant is on trial charged with an offense known in the law as contempt of the House of Representatives of the United States. The specific charge against him is that, having been summoned and served as a witness by the authority

of the House of Representatives, through its Committee on Un-American Activities, to appear and give testimony before this committee at its session in the District of Columbia on April 9, 1947, on matters committed to this committee by the statute and resolution which have been brought to your attention during the trial, and knowing that he was summoned and served, he wilfully failed to appear and thereby made wilful default.

.

Now, this prosecution was instituted pursuant to a statute known as Section 192, Title II, of the United States Code. The provisions of that statute, so far as they are material, are short and simple. They read as follows, so far as material:

"Every person who, having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House of Congress or any committee of either House of Congress, wilfully makes default, shall be guilty of misdemeanor" (R. 337).

The jury returned a verdict of guilty (R. 342). In his motion for a new trial and in arrest of judgment (R. 346), petitioner again maintained that he had not received a trial by a fair and impartial jury (R. 348). Counsel for the petitioner stated that "it was impossible to get a fair trial in a case of this sort where government employees were on the jury" (R. 349). The motions were denied (R. 353). Upon appeal to the Court of Appeals, the petitioner again urged as error the overruling of his challenge to all talesmen who were government employees (R. 413). The Court of Appeals affirmed the conviction, holding that "blanket disqualification" (R. 414) of federal employees for jury service was unjust, and that the jurors in petitioner's trial had on their voir dire asserted complete absence of prejudice (R. 414). This Court granted certiorari (R. 419).

Specification of Errors to be Urged

The Court of Appeals for the District of Columbia Circuit erred:

1. In holding, under the circumstances of this case, that the District Court's denial of petitioner's challenge to jurors who were government employees was not a violation of petitioner's constitutional right to a trial by a fair and impartial jury within the meaning of Amendment VI to the Constitution and Article III, Section 2; paragraph 3 of the Constitution.

2. In affirming the judgment of conviction of the District Court.

Summary of Argument

The decisions of this Court in *Crawford v. United States*, 212 U. S. 183; *United States v. Wood*, 299 U. S. 123, and *Frazier v. United States*, 335 U. S. 497, establish the fact that while government employment in itself may not create a blanket disqualification for jury service, there are particular circumstances in which such disqualification is necessary in order to insure a fair trial. Moreover, under these cases the courts are required where actual bias of government employees is asserted in a case in which the Government is a party zealously to protect the interests of the defendants by broadly investigating all of the circumstances attendant upon the prospective juror's employment and not confine themselves merely to eliciting the subjective responses of the prospective jurors. The fact situations which led this Court in the *Wood* and *Frazier* cases to reject challenges of prospective jurors who were government employees are not present here. This is not an ordinary criminal trial and no consideration relating to timeliness or waiver operates to bar petitioner's challenge.

On the contrary, present here are precisely those "particular circumstances" which, under the *Wood* and *Frazier* cases, require disqualification of prospective jurors who are government employees. The nature of the interest sought to be vindicated in this case is that of actual, not nominal, sovereignty. A further unusual circumstance in this case is that the jurors who were government employees were forced to choose between Congress which fixes the terms of their employment and the petitioner. In addition the instigator of the contempt proceeding against petitioner and the principal witness at the trial was the House Committee on Un-American Activities which has always exerted strong pressures upon government employees who do not conform to its conception of "Americanism." The seven government jurors were, moreover, subjected to the terms of Executive Order 9835 which provides that the activities and associations of federal employees which may be considered in connection with the determination of "disloyalty" include sympathetic association with any organization or group designated by the Attorney General as Communist. In a trial such as the one involved here where the defendant was the General Secretary of the Communist Party, personal security of a government employee would apparently be enhanced if he voted for conviction and endangered if he voted for acquittal.

The activities of the Government in the field of employee loyalty have engendered in the federal establishment hostility to and malice against Communists. This is inevitable when indoctrination occurs in the coercive context of the employment relationship. Such active malice is a particular circumstance which was not present either in the *Wood* or *Frazier* cases and which even at common law effectively supported a challenge of a servant of the crown by a defendant in a crown case. Discharge for disloyalty is a particularly strong sanction akin to an attain of a juror at common law.

The compulsions to which government jurors in this case were exposed must be considered in their collective and cumulative impact and against a background of community prejudice and fear.

No justification exists for sustaining the decision below. In the context of this case the statements of government jurors that they were not biased against the petitioner and would render a fair verdict were immaterial. In any event, the determination of the qualifications of a juror is a judicial function and the court is not bound by the statement of a juror. This is the teaching of the *Crawford*, *Wood* and *Frazier* cases. It was particularly improper to accept a disclaimer of prejudice in a case of this kind involving deeply-felt values and imponderables of which the juror could have no fore-knowledge. The disqualification requested by petitioner was no more "blanket" than the scope of the attacks upon the political independence of government employees. Nor may it be termed, as did the court below, a bill of attainder. On the contrary the inbred character of the petitioner's trial was a legislative trial in the nature of an attainder. Nor was the reliance of the court below on the *Wood* case proper. The carefully erected safeguards of this decision have been ignored by the courts in the District and the decision improperly used to overrule challenge of government employees as jurors in cases where Chief Justice Hughes plainly contemplated that such a challenge would be allowed by the courts. Consideration of vicinage and of cross section do not justify petitioner's jury. For these historic protections of defendants cannot be converted into their opposite.

Because this case has political aspects the requirements of an impartial jury have particularly strong vitality. For the origin and growth of the jury is explained in part by its role as a safeguard of political liberty. The particular circumstances of this case clearly establish that the constitutional provisions for a trial by a fair and impartial jury were not satisfied.

ARGUMENT

Introductory Note

This case is one of a group of cases, growing in number, in which criminal sanctions are being employed in a drive against political opposition and non-conformity.

An important aspect of that pattern has emerged in the District of Columbia where a number of cases have been brought under Section 192, Title II, U. S. Code, charging contempt of the House of Representatives on the part of various individuals because of alleged default before the House Un-American Activities Committee. The individuals who are defendants in this series of cases are identified with organizations under intense attack by the House Committee on Un-American Activities.

All of the defendants in this series of cases have been tried in the District of Columbia, although it is not the home of any of the defendants and is removed from the facilities normally available for their defense. The place of trial is the seat of intense incitement and passion against opponents of the parties in power and dissenters from the political status quo, as these defendants are. Moreover, these defendants have been tried by judges, of whom a great many have formerly been Federal prosecutors in the District of Columbia. The trials before these judges and before the juries of this community have all been on indictments asked for and obtained by United States attorneys at the request of the House Un-American Activities Committee, supported by resolutions of the House of Representatives.

In all instances the defendants have been tried before a jury composed, at least in part, of government employees. See *Bryan v. United States*, 174 F. (2d) 525;

Fleischman v. United States, 174 F. (2d) 519; *Lawson v. United States*, 176 F. (2d) 49; *Trumbo v. United States*, 176 F. (2d) 49; *Morford v. United States*, 176 F. (2d) 54, and *Marshall v. United States*, Case No. 9864, decided June 29, 1949—all in the Court of Appeals for the District of Columbia.

This Court has granted certiorari in the petitioner's case in order to consider whether the presence of government employees on the jury, who in fact constituted a majority of the jury which tried petitioner, resulted in a trial by a jury which was not impartial. We are convinced that governmental activities in the area of employee "loyalty", together with other considerations which are discussed in detail in this brief, have rendered government employees ineligible to serve on juries in cases of this type. We believe that these activities seriously violate the constitutional rights of government employees. That issue, however, is not involved in this case. What is involved is that the violation of the rights of government employees must not be permitted to become a means for the violation of the constitutional rights of others as well.

The injuries which the petitioner suffered because of the presence on the jury of government employees, residents of the District of Columbia and its environs, are particularly severe because the petitioner is the General Secretary of the Communist Party, an organization which has been an outstanding target of prejudice-creating instrumentalities in the District, and because the jurors were constantly reminded that the case involved a test of strength between the petitioner and the Government of the United States.

I

Principles governing the qualification of prospective jurors who are government employees.

This Court has had before it the general question of whether government employees may properly serve on juries in which the Government is a party, in three cases, *Crawford v. United States*, 212 U. S. 183; *United States v. Wood*, 299 U. S. 123, and *Frazier v. United States*, 335 U. S. 497. We think it is accurate to summarize the rulings of these cases as follows:

1) While the fact of government employment in itself may not always create a blanket disqualification for jury service of government employees in a case in which the Government is a party, nevertheless there are special circumstances in which such disqualification is necessary as a matter of law in order to insure a fair trial.

2) Even if government employees under such circumstances are not disqualified, because of a bias implied in law, they may be challenged for actual bias.

3) In investigating actual bias, the courts—particularly in the District of Columbia—must be particularly zealous to protect the interests of defendants.

4) An investigation of actual bias should not be confined to eliciting the subjective responses of the prospective jurors, but must include a consideration of all of the circumstances of the prospective juror's employment.

In the *Crawford* case, the prosecution was for conspiracy to defraud the United States in relation to a contract with the Post Office Department. It was charged

that the defendant had corruptly agreed with an official of the Post Office Department to pay him a sum of money in return for the acceptance by the Department of the bid of the firm of which the defendant was a member. The trial court overruled a challenge to a juror who was a druggist, and in whose store was a subpostal station, with the juror acting as clerk in charge. This Court reversed, holding the juror disqualified for cause as a juror as a matter of law because of his implied bias.

Although the holding in the *Crawford* case was subsequently restricted by this Court, we submit, nevertheless, that two of its basic teachings survive and have present vitality.

First, the Court in the *Crawford* case, in explaining the basis for the fact that the disqualification is implied in law, pointed out that the bias of a prospective employee juror could not be adduced on the basis of his subjective response (212 U. S. 183, 196):

"Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most widely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given."

Second, the Court pointed out that the judgment requiring disqualification is based upon an evaluation of *possibilities* (212 U. S. 183, 197):

"It need not be assumed that any cessation of that employment would actually follow a verdict against the government: It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror."

The *Wood* case involved a charge of petty larceny from a department store in the District of Columbia. The qualifications of three jurors were at issue; one being a widow of a Civil War Veteran who was a recipient of a pension, the other two being clerks, one of whom was employed in the Treasury Department, and the other in the Navy Yard.

The decision in the *Wood* case confirms the statutory removal (District of Columbia Code, Sec. 11-1420) of the absolute disqualification which the *Crawford* case had imposed on Federal employees to sit as jurors in criminal cases. The *Wood* decision announces that government employees are no longer as a class disqualified from eligibility as jurors in all prosecutions. In re-examining the *Crawford* ruling, the Court in the *Wood* case pointed out (299 U. S. 123, 140):

"It will be observed that the employment [of the juror in the *Crawford* case] was in the very department to the affairs of which the alleged conspiracy related."

The Court criticized (at p. 140) the decision to the extent that it "took a broader range and did not rest upon that possible distinction."

However, the Court made it clear that government employees may be disqualified in certain types of prosecutions.

"We are unable to accept the ruling in the Crawford case as determinative here or to reach the conclusion that it was a settled rule of the common law prior to the adoption of the Sixth Amendment that the mere fact of a governmental employment, *unrelated to the particular issues or circumstances of a criminal prosecution*, created an absolute disqualification to serve as a juror in a criminal case" (299 U. S. 123, 141). (Italics supplied.)

"We think that the imputation of bias simply by virtue of governmental employment, *without regard to any actual partiality growing out of the nature and circumstances of particular cases*, rests on an assumption without any rational foundation" (299 U. S. 123, 149). (Italics supplied.)

"It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. *Unless the suggestion be taken to have reference to some special and exceptional case* it seems to us far-fetched and chimerical" (299 U. S. 123, 150). (Italics supplied.)

The Court merely assimilated government employees to private employees and recognized that just as there are numerous instances where bias is imputed to a class of private individuals without regard to whether the particular individual of the class that is challenged is, in fact, biased or prejudiced,³ so under appropriate circumstances, government employees as a class may be disqualified to serve as jurors without regard to the actual bias of the individual juror.

Even with respect to the determination of actual bias, the Court made it clear that objective circumstances, rather

³ See, for example, *Anderson v. Todd Shipyard Corp.*, 63 Fed. Supp. 229; *Miller v. U. S.*, 38 App. D. C. 361; *Young v. Marine Ins. Co.*, Cranch C. C. (1 D. C. 452, Fed. Cas. No. 18, 163).

than subjective response of the prospective juror, are determinative and that judicial inquiry—particularly in the District—must be thorough and complete in establishing the existence of such circumstances.

“All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature of circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him” (299 U. S. 123, 133-134).

And again:

“We repeat, that we are not dealing with actual bias, and, *until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused*” (299 U. S. 123, 150). (Italics supplied.)

The *Frazier* case involved a conviction under the Harrison Narcotics Act, 26 U. S. C., Section 2553. All of the members of the jury were government employees, and one of them, and the wife of another, came under the same ultimate departmental supervision (the Treasury Department) charged by law with responsibility for administering and enforcing the statute involved. A divided court reaffirmed the *Wood* decision and rejected the challenge of the two employees mentioned above as untimely.

In addition to the untimeliness of the challenge, this Court in the *Frazier* case regarded as well-nigh decisive the circumstance that the petitioner appeared to be repudiating the consequences of his own selection of jurors.

In the instant case no contention could possibly be made that the petitioner's challenge of government employees as jurors was untimely. At the outset of the trial, a motion was made for change of venue on the ground that a fair trial would be impossible if government employees were permitted to serve (R. 27-32). At the earliest possible opportunity petitioner challenged for cause all government employees (R. 64) and, in contrast to the situation in the *Frazier* case, the petitioner used two of his three peremptory challenges against government employees (R. 51, 82, 54, 71).

In discussing the *Wood* case, this Court in the *Frazier* case quoted with approval (at p. 509) the statement in the *Wood* case that:

"In criminal prosecutions the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society. In that enforcement all citizens are interested. It is difficult to see why a governmental employee, merely by virtue of his employment, is interested in that enforcement either more or less than any good citizen is or should be"

As we shall show in detail, this is not a case in which the Government is proceeding "simply as the instrument of the public in enforcing penal laws for the protection of society." The Court emphasized that it was reaffirming the *Wood* ruling insofar as that ruling removed disqualification arising out of government employment alone apart from the "nature and circumstances of particular cases." Moreover, in discussing the *Wood* case, the Court pointed out (at p. 511) that that decision "seems to contemplate implicitly that in each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection of the score, of impartiality, As we shall show, such "solid basis of objection" is amply present here. Finally the Court again stressed (at p. 511) the view of the *Wood* case that it is "not only prejudice in the subjective sense but also such

as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise'."

Precisely those exceptional circumstances are present in this case which, under the *Wood* and *Frazier* cases, require the disqualification of government employees as jurors as a matter of law. Moreover, under the standards laid down in those cases, such government employees were also disqualified for actual bias and it was a manifest abuse of discretion to permit them to serve.

*Because of the compulsions imposed upon the jurors here flowing from demands of "ideological loyalty" the following statement from Justice Jackson's dissenting opinion in the *Frazier* case (at p. 515) is strikingly apt here:

"Of late years, the Government is using its power as never before to pry into their lives and thoughts upon the slightest suspicion of less than complete trustworthiness. It demands not only probity but unquestioning ideological loyalty. A government employee cannot today be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every such prosecution. And prosecutors seldom fail to stress, if not to exaggerate, the importance of the case before them to the whole social, if not the cosmic, order. Even if we have no reason to believe that an acquitting juror would be subjected to embarrassments or reprisals, we cannot expect every clerk and messenger in the great bureaucracy to feel so secure as to put his dependence on the Government wholly out of mind. I do not doubt that the government employees as a class possess a normal independence and fortitude. But we have grounds to assume also that the normal proportion of them are subject to that very human weakness, especially displayed in Washington, which leads men to * * * crook the pregnant hinges of the knee where thrift may follow fawning'. So I reject as spurious any view that government employment differs from all other employment in creating no psychological pressure of dependency or interest in gaining favor, which might tend to predetermine issues in the interest of the party which has complete mastery over the juror's ambition and position. But even if this suspicion can be dismissed by the Court as a mere phantasy, it cannot deny that such a jury has a one-sided outlook on problems before it and an appearance of government leverage which is itself a blemish on the name of justice in the District of Columbia."

The circumstances of this case made it inappropriate for federal employees to serve on the jury.

A number of circumstances decisively distinguish this case from the cases discussed in the preceding section of this brief and present the very situation described in those cases when it becomes inappropriate to permit government employees to serve on a jury in a case involving the Government.

Each of these circumstances separately, in our view, requires the conclusion that government employees were not qualified to sit as jurors as a matter of law in this case and that they were also disqualified for actual bias. When all of these circumstances are considered together we submit that these conclusions are irresistible.

A marked distinction between this case and a case such as the *Wood* case or *Frazier* case lies in the character of the interest which is sought to be vindicated. In the *Wood* and *Frazier* cases the nature of the interest which the Government sought to vindicate was that of a formal prosecutor, the representative of the people, proceeding against the accused as the keeper of the peace.

But this is a contempt case. The prosecutor is not a formal representative of a nominal sovereignty. In this case the Government of the United States has asserted an actual, deep, serious determined self-interest. It asserts that it has been attacked directly by the accused with respect to its orderly functions of government. Its mandates are alleged to have been broken, flouted. It harshly calls upon its law-enforcement agencies for vindication. In all of its solemn sovereign dignity, it approaches one of its own tribunals and as a direct, injured, demanding suitor it calls upon the court to punish the accused and indeed, for punishment as severe as the law will permit.⁵

⁵ On the floor of Congress, while debating the resolution to punish the petitioner for contempt, Congressman Mundt stated:

"I hope that whatever judge has before him this particular contempt case, after the House votes it, as I am sure the House

The jurors in the *Wood* or *Frazier* cases could hardly have been told, as the jurors in this case were, that the defendant "believed that he was bigger than and greater than and more important than the United States Government" (R. 298), that "Lord help the Government of the United States" if such defendant could "defy the law, and defy the representatives who have been elected by the citizens of this country * * *" (R. 303). It could hardly have been said of the accused in the *Wood* case or the Narcotics Act violator in the *Frazier* case that "if any individual could hold himself up as greater than the Congress of the United States, then, as I say, God help Congress and God help our government * * *" (R. 331).

This Court cannot say here, as it did in the *Wood* case (at p. 149), that "the Government is acting simply as the instrument of the public in enforcing penal laws for the protection of society * * *. It is difficult to see why a government employee, merely by virtue of his employment is interested in that enforcement either more or less than any good citizen should be."

Moreover, the government employees serving on the jury were called upon to choose, not between an abstract governmental power and the petitioner but between the Congress and the petitioner, between, on the one hand, the very body which is clothed with legislative power to determine the

will, that the Judge will uphold the dignity of the Courts and the Constitution to the point of giving Eugene Dennis the maximum penalty allowable under the law which is 1 year in jail, plus a \$1,000 fine." 93 Cong. Rec., 3815.

* * * * *

"I want to say too that because I have every hope that Eugene Dennis will wind up in the penitentiary as the result of the present proceedings, that when and if that happy eventuality occurs. * * *" id., 3815.

Mr. Mundt agreed with Mr. Smith of Ohio, that the Attorney General would have failed in his duty and be subject to impeachment "if he does not prosecute these cases", id., 3815. If this be the threatened fate of the Attorney General, it is difficult to believe that government employees could render a fair and impartial verdict.

conditions of their tenure (for example, 18 U. S. C. Sec. 61) and the petitioner. In contrast to this case, the jurors in the *Wood* case could have acquitted without fear of affronting the branch of the Government which appropriates the funds for their salaries. Can it be seriously questioned that the failure of the jurors in this case to convict the petitioner would be recorded as an affront to the House of Representatives which had voted a contempt citation petition and certified to the United States Attorney, under the seal of the Speaker of the House of Representatives the alleged refusal of the petitioner to appear before the Committee on Un-American Activities? (R. 373-375).

More important, perhaps, in terms of pressures upon the employee jurors, is the fact that the instigator of the charges against petitioner and the prosecuting witness was the House Un-American Activities Committee. The record shows how completely the Committee identified itself with and how prominent its participation was in this case (*supra*, pp. 3-7).

The government-employee jurors could have acquitted the defendant in the *Wood* and *Frazier* cases without fear that they would be investigated and denounced as "subversive" by the agency sponsoring the prosecution. But we strongly doubt that any juror in this case was, or could be, free of the fear in view of the record of the House Un-American Activities Committee (to be discussed below) that an acquittal might bring in its wake an attack by the Committee, if not discharge and disgrace.

Finally, at the time the petitioner was tried, the members of the jury who were government employees had been subjected to a continuing attack upon and investigation of their political beliefs, to make absolutely certain that none of them was "subversive". At the time of the trial the Federal establishment had already been subjected to an intensive screening for the purpose of eliminating all employees who even, on the faintest evidence and the remotest basis, might be charged with membership in or

affiliation with or sympathy for Communist organizations or the Communist Party.

Many employees had been discharged for alleged subversive opinions and "Loyalty Order" (Executive Order 9835, 12 Fed. Reg. 1935) had been promulgated on March 22, 1947. This Order, only three months old at the time of the voir dire, marked the ultimate step in a long governmental process of attacks upon the political attitudes and beliefs of governmental employees. This Order will be discussed at a later point in this brief. It is sufficient for our present purposes to note with respect to the Order that it is initiated with the announcement that "each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States."

In that portion of the Order dealing with standards, Part V, the Order designates as a standard in determining disloyalty "membership in, affiliation with or sympathetic association with" organizations designated as Communist by the Attorney General. Finally, it must be noted that not only the files of the Federal Bureau of Investigation, but also those of the House Committee on Un-American Activities are designated as appropriate sources in determining employee "loyalty". In his summation, the prosecutor reminded the jury of the existence of the Order (R. 300).

In short, the government employee members of the jury at the time that this case was tried were faced with possible discharge and disgrace for sympathetic association with organizations such as those of which petitioner is a leader and on the basis of a determination by the head of the very Department of Government charged with responsibility for prosecuting this case.

The activities of the Government in the area of employee "loyalty" have made impartiality impossible in a case such as this. These activities constitute more than a mere process of screening from the Federal establishment employees or applicants for employment with non-conformist or unorthodox views. Considered in their total impact, they are

a positive method of conditioning the mind of the employee to a fear and a hatred of Communists and Communism, as a threat to the essential processes of government. These activities do more than create fearful or unwilling captives; they create converts. They infuse the Federal establishment with an active malice against those, such as petitioners, who stand in fundamental political opposition to the administration.

The government employees who served on the jury in the *Wood* and *Frazier* cases were not deluged upon all sides by a campaign of hate against those who commit petty larceny or violate narcotics statutes. They were not repeatedly reminded that it is virtually an obligation of government employment to show an active animus against those who are accused of such offenses. Their association with these accused of such offenses was not officially confined to hostile association.

It cannot be contended that civil servants have somehow managed to resist the unremitting campaign of pressure to abandon views of a progressive character on the grounds that they are Communistic, to escape the compulsions inherent in the employment relationship, and to take an independent view of their employer's desires and preferences.

Long ago this Court pointed out that even in the private employment relationship (*I.A.M. v. Labor Board*, 311 U. S. 72, 78) "slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure." The coercive power of an employer's appeals is not lessened when they occur in connection with political views and attitudes, rather than in the choice or rejection of labor unions.

Moreover, the Government's campaign to rid the Federal establishment of progressives or those who are not anti-Communist has been supplemented and reinforced by an incessant barrage of propaganda in the press and radio and by the speeches and press releases of politicians who use the theme of "coddling Communists on the Federal

payroll" as safe political currency on any and all occasions.

Where jurors, in the coercive context of the employment relationship, are indoctrinated by their employer, the Government, with malice and hatred against a class of defendants of which the petitioner is so outstanding an example, can there be any question that as a matter of law such jurors should not be permitted to serve in a case brought by the Government against the petitioner?

Even at a time when the royal prerogative was so exalted as to lead commentators to deny the right at common law to challenge a servant of the crown either in principal or to the favour, it was recognized in a classic work on trial by jury, Giles Duncombe, *Trials per Pais* (9th Ed., 1793) that while a challenge for favour to the king might not lie on the part of the defendant in a criminal case such a challenge of a prospective juror for malice to a defendant might lie.

Thus Duncombe states (at p. 189):

"In an action betwixt the king and a party, the subject cannot take any challenge for favour as in an indictment for barrettry, &c., the defendant cannot challenge a juror for favour to the king."

Duncombe, however, further points out (at p. 203):

"'Tis no challenge to say, the juror is king's tenant or that his is favourable to the king but it is good to say the sheriff or juror bears grudge or malice to the defendant where the king is party."

Thus Duncombe while seemingly allowing no challenge against a crown servant even for actual favour to the king (see *United States v. Wood*, 207 U. S. 119, 135-136), nevertheless asserts that an exception to this rule exists where what is shown is not favour to the crown but malice against the defendant.

Certainly it cannot be denied that, wholly apart from active malice against petitioner, fear of loss of employment

operates to destroy impartiality of government employees serving as jurors in a case such as this.

Can it be doubted that employees who in a case of this character should vote to acquit the petitioner, might have serious grounds of concern for their jobs?

In assessing whether it is reasonable to assume the existence of fear in the minds of such employees, we must bear in mind that the government employee is constantly confronted, either on the basis of his own knowledge or of the reports of newspapers and radio columnists, with the fact that employees have been discharged for "disloyalty" or for engaging in "subversive activities."

If examples of discharges of others for union activity are properly deemed to create fears in the minds of private employees with respect to their own activity (cf. *I.A.M.* case *supra*, at p. 78), how can it be said that discharges for political reasons do not operate to intimidate and coerce? Certainly, it cannot be contended that government employment renders employees more impervious to such pressures, for precisely the contrary is true. Government employees' concern for security of tenure is a dominating element in their relationship to their employer, and they normally respond far more sensitively to pressures when their job appears to be in the balance.

Finally, we must bear in mind that what the employee has been taught to fear is not merely discharge--although in itself it is a formidable source of pressure. The sanction is far stronger where "loyalty" is involved than the private employee's fear of termination. For what faces the government employee is not merely a discharge by an employer who regards an adverse vote on the jury by his employee as an act of faithlessness. It is not alone formal severance from the payroll that the government employee fears, it is rather the stigma of being branded "disloyal" or "subversive" or a "poor security risk", with all that is involved in terms of degradation, of good name, of future employment opportunities. See Andrews, *Washington Witch Hunt* (1948), pages 61-73.

For a government employee who is terminated or purged for such a reason is barred for all time from all government employment; a life's vocation is destroyed. *United States v. Lovett*, 328 U. S. 303. Moreover, he encounters grave if not insuperable difficulties in obtaining private employment. For what private employer will be so brave as to give employment to one branded as "disloyal" by his Government?

In short, we are not dealing with a discharge or termination drained of adverse color, the reasons for which may be readily explained. A private employee whose discharge follows a verdict favorable to his employer's opponent in a case in which he served on the jury feels no sense of shame, no reflection upon himself, no embarrassment in explaining why he was discharged.

But a government employee who is discharged because he shows "sympathetic association" with "Communism" suffers disgrace, a harsh punishment, the results of which may be profound and lasting. It is, in effect, an attain. Cf. the *Lovett* case, *supra*. The great landmark judgment of the Court of Common Pleas in *Bushell's Case* (1 Vaughn 135) stands as a perpetual reminder that jurors in criminal cases are subject neither to attain nor a fine by the crown. This case makes it clear that integral to the institution of trial by jury is the proposition that the individual can forfeit his liberty—to say nothing of his life—only at the hands of those who are in no way accountable directly or indirectly for what they do, and who are completely free of precisely those pressures and sanctions which confront government employees in a case such as this.

Under the "particular circumstances" of the case on which they sat and its relationship to their government employment, the seven government employees did not enter the jury box as impartial jurors.

III

Because of the "loyalty" programs and campaigns of which they have been victims for a 10-year period, government employees could not properly serve as jurors in this case.

Governmental activities in the area of employee "loyalty" which make it impossible for such an employee to serve as an impartial juror in a case of this sort have a long genealogy of substance.

Attempts to control political views and affiliations of government employees may properly be considered in three aspects. First, the House Un-American Activities Committee has, from its very inception, made the political views of government workers a target of unremitting attack. It was this Committee which pioneered in the techniques of smear and innuendo of broad charges and loose standards, of hit and run, which, to a large extent, became the pattern for similar activities in other branches of Government. The House Un-American Committee concentrates almost exclusively upon the technique of "exposure". Wherever possible the Committee has supplemented this sanction by influencing other organs of the legislature in sympathy with its program and methods to adopt more direct sanctions. See *United States v. Lovett, supra*. The record and the techniques of this Committee are of significance here not only because they shed a revealing light upon the emergence of the process through which government employees have lost their liberty, but also because it is this Committee—so prominently identified with the establishment of dangerous and arbitrary standards of "loyalty" as a condition of employment—which is the instigator of this prosecution and, indeed, its leading witness.

Second, the issue of employee "loyalty" became, long before the prosecution in this case was instituted, a concern, and indeed, a political strategy not only of the House Com-

mittee but also of many other organs of our Government. Attacks at various bureaucratic levels on the loyalty of government employees left their mark upon their political attitudes and independence.

Finally, Executive Order 9835 to which reference has already been made, and to which the government employees who served on this jury are subject, creates decisive economic compulsions and marks the culmination of attempts to assure the political conformity of government employees, and their orientation against views or attitudes which could, under the loose and sometimes bizarre standards of the day, be termed "communistic".

A. The House Committee on Un-American Activities

In 1938 the House Committee on Un-American Activities was established. From the very first the Committee took a particular interest in "communist infiltration" into government. In 1939, Congressman Dies released to the press a list of over 500 Federal employees who were charged with being members of the American League for Peace and Democracy. Hearings on Un-American Activities, pages 6043 *et seq.* (1939).

When the list was published demands were promptly made on the floor of Congress that the employees named be dismissed. New York Times, June 10, 1940, page 8, column 2.

Although it was later established that many of those on the list had never belonged to the organization, no retraction or correction of the list was ever made.

The Committee's principal activity is the building of dossiers of individuals and organizations which do not conform to its standard of loyalty or Americanism. Even in 1943, after less than five years of existence, the Committee had accumulated a file of over 1,000,000 cards containing information on individuals and organizations. H. Rep. No. 2748, 77th Cong. 2d Sess. (1943), 2. The list has been constantly growing since then (R. 190).

The Committee's main weapon is publicity—a public attack without affording the victim an opportunity for defense.

The Committee has repeatedly made it clear that one of its prime purposes is the elimination from public employment of all those whom it considers "Un-American" and "subversive". Hearings before Special Committee to Investigate Un-American Activities on H.R. 282, Vol. 9 (1939), 5447. A partial list of prominent government officials who have been publicly denounced by this Committee would include Franklin D. Roosevelt, Henry Wallace, Frank Murphy, Archibald MacLeish, Chester Bowles, David Lilienthal, Edgar Warren, Frances Perkins, Leon Henderson, Harold L. Ickes, Dr. Edward U. Condon. The average government employee observing the smearing of reputations by this Committee in the last ten years would require superhuman fortitude to withstand the pressure which this Committee puts on employees of government. Moreover, it is enough to frighten the most courageous to see what activities or ideas this Committee has during the course of years regarded as "subversive".

In 1941, the chairman of the Committee sent a list of 1,121 persons in Federal posts to the attorney general, charging that they were "Communists or affiliates of subversive organizations". In a letter accompanying the list, he urged:

"The retention on the Federal payroll of several thousand persons who, to put the matter mildly, have

* The Committee thus describes its methods: " * * * exposure is the most effective weapon that we have in our possession." 83 Cong. Rec. 7570 (1938). " * * * focus the spotlight of publicity upon their activities." H. R. Rep. No. 2, 76th Cong., 1st Sess. (1939), 13. " * * * by turning the light of pitiless publicity on the activities of organizations," id., 24. "It is the way of exposure—a way which conforms to the letter and spirit of democracy, and is at the same time more effective than a Gestapo," H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941), 23, 24. " * * * this 'grand jury' will be in session to investigate un-American activities at all times." 91 Cong. Rec. 275 (1945). " * * * seek out and expose those activities which although legal are nonetheless un-American, subversive and contrary to the American concept." 92 Cong. Rec. 5217 (1946).

strong leanings toward Moscow will confirm the widely held suspicion that a large and influential sector of official Washington is utilizing the national emergency for undermining the American system of democratic government." New York Times, October 20, 1941, p. 1, col. 3.

It will be noted that it is not actual membership in the Communist Party that draws fire from the branch of the Government which controls the purse-strings, but "leanings toward Moscow". Ideas which have been condemned by the Committee include social and racial equality, H.R. 2, 76 Cong. 1st Sess. (1939); duty of government to support the people, *id.*; criticism of General MacArthur and Chiang Kai-Shek, H.R. 2233, 79th Cong. 2nd Sess. (1946); attacks upon cartels and other industrial organizations, *id.*; America is a democracy, 79th Cong., 2nd Sess., Daily Appendix, 740 (1946); opposition to the Franco Government of Spain, H.R. 2233, 79th Cong., 2nd Sess.; advocacy of a world state, *id.*; criticism of members of Congress, H.R. 2277, 77th Cong., 2nd Sess. (1942). If these be "subversive",¹ what shall be said of a government employee who acquits the leader of the Communist Party of a charge of contempt of the House Committee on Un-American Activities, especially when that Committee and the House of Representatives have solemnly declared, prior to the trial, that the said leader of the Communist Party was in "wilful, deliberate, and inexcusable" (R. 158) contempt?

¹ The opinion in the *Lovett* case reveals even this Court's difficulty with the term "subversive". The employee in Government, like every other person, finds himself required to conform to the dictates of the Committee on Un-American Activities without even possessing a standard or norm with which to guide his thinking, if such a thing were possible. Added, therefore, to his difficulties is the fear of uncertainty. What is "disloyal" or "subversive" or "un-American"? The answer is as numerous as the minds of men. Commander, "Who Is Loyal to America?" Harper's Magazine, September, 1947. Certainly Chairman Thomas was not reassuring when he stated in this trial that he would "assume that every member of our Committee now has a very good idea of what constitutes un-American activities" (R. 193), but he could not speak for "Mr. Rankin", nor "Mr. Wood, or Mr. Mundt, or Mr. Peterson, or any of the others" (R. 193).

Two judges of Courts of Appeals have expressed their views on the inroads which the Committee has made on freedom of opinion and conduct.

"Here there can be no doubt of that intended and actual consequence of the investigation. The Committee announces its desire that the persons it finds guilty shall forfeit their jobs in public and private industry and shall be subject to prosecution for any collateral crimes which may have been disclosed, and generally shall be exposed pitilessly to public condemnation. That it is successful in its purpose the daily papers show. There can be no doubt of the obvious and direct abridgment of the right freely to speak and express one's opinions which is thus achieved."

Clark, J., dissenting in *United States v. Josephson*, 165 F. (2d) 82, 100, (C. C. A. 2), cert. denied 68 S. Ct. 609.

"The investigation restricts the freedom of speech by uncovering and stigmatizing expressions of unpopular views. The Committee gives wide publicity to its proceedings. This exposes the men and women whose views are advertised to risks of insult, ostracism, and lasting loss of employment. Persons disposed to express unpopular views privately or to a selected group are often not disposed to risk the consequences to themselves and their families that publication may entail. The Committee's practice of advertising and stigmatizing unpopular views is therefore a strong deterrent to any expression, however private, of such views.

The investigation also restricts freedom of speech by forcing people to express views Witnesses before the House Committee are under pressure to profess approved beliefs. They cannot express others without exposing themselves to disastrous consequences. . . . That the Committee's investigation does in fact restrict speech is too clear for dispute. The prosecution does not deny it and the Court concedes it. The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who

might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to speak. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure."

Edgerton, J., dissenting in *Barsky v. United States*, 167 F. (2d) 241, 254, 255 (App. D. C. 1947), cert. denied 68 S. Ct. 155, pet. rehearing pending.

What has been the effect of this Committee's activities? The President's Committee on Civil Rights stated: "A state of near-hysteria now threatens to inhibit the freedom of genuine democrats." Report, *To Secure These Rights* (1947), p. 49. "There is hysteria, in Washington and the country; the Thomas Committee has helped to whip it up, so has the not very well-informed clamor of some Congressmen outside that Committee; and the result is that we are making ourselves ridiculous in the eyes of the world." Andrews, *Washington Witch Hunt* (1949), p. 47. "The state of mind being created is a kind of plot-and-persecution system akin to paranoid obsession and like paranoia impervious to correction by rational argument." I. F. Stone, *The Nation*, November 8, 1947, 492. "A man with a family will think many times before speaking his mind fearlessly and critically when there lies ahead the threat of an Un-American investigation, a publicized branding, and his job gone. It is small consolation to know that you cannot be put in jail for your opinions if your opinions, freely expressed, end by starving your dependents." Martha Gelhorn, "Cry Shame!", *New Republic*, October 6, 1947, 21.

"One of the most startling manifestations of the police state in our time is the campaign of terror against liberal government officials, taking the form of Con-

gressional parges of federal employees, against whom have been leveled charges of disloyalty and Un-Americanism. . . . I call it startling because there has been nothing like it in the history of the American Republic; because it has operated irresponsibly and even unconstitutionally; because it has ignored the elementary judicial decencies; because it shows how legislative terrorism can function in the shadow world of political surveillance.

This may sound harsh; I mean it to be just. I am speaking of the entire record of the House Committee to Investigate Un-American Activities. I am speaking of its now famous campaign against the Thirty-Nine, begun in Congress in February, 1943, whose Anabasis has not yet found its adequate Xenophon; I am speaking of the effort to pass a bill of attainder through the expedient of attaching a rider to an appropriation bill precluding the payment of any funds to specific persons, thus using the power of the purse to achieve wholly unfiscal purposes; I am speaking of the vague and confused definition of what is subversive, on the basis of which the dismissal of devoted public servants was recommended; I am speaking of the instilling of fear into the hearts of tens of thousands of other public officials who felt that they might at any moment be denounced and dismissed, and both their names and careers infected with an ineradicable taint."

Lerner, M., "Freedom: Image and Reality" in *Safeguarding Civil Liberty Today* (1945), pp. 44, 45.

This, in summary, is the House Committee on Un-American Activities, the prosecuting witness in the case against the petitioner in the District of Columbia, and on the jury to decide the issue between them, sat seven government employees, allegedly "impartial". If under circumstances such as these, government employees can be said to be "indifferent as they stand unsworn" (Coke on Littleton, I, 155 a (d)), the provisions of the Sixth Amendment to the Constitution have a hollow ring.

B. Attacks Upon Employee Loyalty by Government Agencies Other Than the House Un-American Activities Committee

Employee "loyalty" has not been the concern exclusively of the House Un-American Activities Committee. Many other governmental agencies have been active in the field.

In 1939, Congress passed the Hatch Act, 18 U. S. C. Section 61 i (1946). This Act provided:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

The Civil Service Commission issued the following ruling in 1940 to implement the Hatch Act (Departmental Circular No. 222, June 20, 1940):

"The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy, it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist Party, the German Bund, or any other Communist, Nazi, or Fascist organization."

As a result of this ruling, all new employees of the Government have from that time signed a statement upon entering into government service, that they are not members of the Communist Party.

Moreover, Congress has, since 1941, attached to all appropriation acts a rider which specifies that no part of the funds appropriated should

"be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence."

A vague standard of "loyalty" which served to destroy virtually all theretofore established safeguards for the protection of government employees was established in 1942, in regulations which provided that an employee or potential employee would be denied clearance by the Civil Service Commission for government employment or transfer within the Government where there existed "a reasonable doubt as to his loyalty to the Government of the United States". 7 Fed. Reg. 7723, Section 18.2(c) (1942).

No standard at all was prescribed for the so-called "sensitive agencies." As early as June, 1940, Congress authorized the War and Navy Departments* and the Coast Guard to remove an employee summarily when such "immediate removal is, in the opinion of the Secretary concerned, warranted by the demands of national security." 54 Stat. 679, 713 (1940), 50 U. S. C. App., Section 1156 (1946).⁹

* Of the seven jurors in this case who were government employees, two were employed by the Navy Department (R. 56-89), while one juror who was an employee in the Department of Commerce is related to a Navy employee (R. 68).

⁹ This provision has the effect of eliminating the statutory protections against discharge accorded permanent status full-time employees. Andrews, *Washington Witch Hunt* (1948), p. 11. In 1946 the McCarran rider extended this authority to the Secretary of State. Pub. L. 490, 79th Cong., approved July 5, 1946; 60 Stat. 453. State Department regulations pursuant to this authority provided that an employee might be dismissed if he were "a person who has such basic weakness of character or lack of judgment as reasonably to justify the fear that he might be led into" a course of action condemned by the statute. New York Times, October 8, 1947, p. 8, cols. 5, 6. It was under these regulations that 10 State Department employees were dropped in the summer of 1947 as "poor security risks". *Andretes, supra*, p. 12.

Nor was all this merely a matter of unenforced statutes and regulations. Under the constant urging and speeches of members of Congress an extensive and widespread process of investigation was begun of which no Federal employee or resident of Washington could be long unaware. In 1941, Congress appropriated \$100,000 to finance an investigation of alleged subversive employees by the Federal Bureau of Investigation. Department of Justice Appropriation Act, 55 Stat. 289, 1941.

The Federal Bureau of Investigation throughout the war engaged in extensive investigation of Federal employees. From July 1, 1942 to June 30, 1946, the Federal Bureau of Investigation conducted investigations of 6,193 employees. Report of the President's Temporary Commission on Employee Loyalty (1947), 16-17. In the period from July 1, 1940, through March 31, 1947, the Civil Service Commission conducted loyalty investigations of 395,000 employee applicants or actual government employees. Hearings Before Committee on Post-Office and Civil Service on H. R. 3588, 80th Cong., 1 Sess. (1947) 54. In addition, special investigations within the War and Navy Departments were conducted by the Office of Naval Intelligence and the Military Intelligence Division.

In the halls of Congress, the issue of the loyalty of government employees was raised continually and government employees were constantly under attack. In 1943, a Special Sub-Committee was established in the Appropriations Committee to investigate the alleged "subversive" activities of 38 prominent Federal workers. As a result of the labors of this committee, the dismissal of 3 employees was recommended—Robert Morris Lovett, Goodwin B. Watson, and William F. Dodd, Jr. 89 Cong. Rec. 4581, *et seq.* (1943).

With the close of the war pressures from Congress to remove "subversive" employees from the Government increased. In 1946 the House Civil Service Committee appointed a sub-committee to make an investigation "with

respect to employee loyalty and employment policies and practices in the Government of the United States." This committee reported:

"The reason for comparatively few decisions of eligibility on loyalty grounds resulting in the actual removal of employees from Government service should be given study and the reason therefor clearly stated."¹⁰

In the 1946 Congressional elections the issue of the loyalty of government employees was raised not only in Washington but throughout the country. Following the election the President appointed a Temporary Commission on Employee Loyalty. Executive Order No. 9806, 11 Fed. Reg. 13863 (1946). The Commission consisted of representatives of the Civil Service Commission, the Department of Justice and the Treasury, State, War and Navy Departments. Their report was made public in March, 1947—three months before the jury was selected for the trial of the instant case.

The conclusions of this report were that existing laws and regulations failed to protect the Government sufficiently and did not "furnish adequate protection against the employment or continuance in employment of disloyal or subversive persons." The recommendations of the Commission were incorporated in Executive Order 9385, known as the Loyalty Order, issued March 22, 1947, 12 Fed. Reg. 1935 (1947).

The result of the intervention by the Government into the realm of employee political attitudes, beliefs and opinions has inevitably been to create among government employees insecurity, fear and prejudice with respect to these matters. They are not qualities which produce impartial juries in a case of this sort.

¹⁰ *Committee on the Civil Service, Report of Investigation with Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States, 79th Cong., 2d Sess. 6 (1946).*

C. Executive Order 9835 ¹¹

Three months before the voir dire in this case, each prospective member of the jury who was a government employee was under official notice that his employment was in jeopardy, that the question of his attitude toward the political organization headed by the petitioner would be decisive in determining whether he would be severed from his life's vocation, and that such determination would be made on the basis of official action taken by the agency prosecuting the petitioner.

The salient provisions of the Executive Order are the following:

"PART I

3. An investigation shall be made of all applicants of all available pertinent sources of information and shall include reference to:
 - a) Federal Bureau of Investigation files.
 - b) Civil Service Commission files.
 - c) Military and naval intelligence files.
 - d) The files of any other appropriate government investigative or intelligence agency.
 - e) House Committee on Un-American Activities files.
 - f) Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county and state law-enforcement files.
 - g) Schools and colleges attended by applicant.
 - h) Former employers of applicant.

¹¹ For an analysis of this order and the procedures taken under it, see Emerson and Helfeld, "Loyalty Among Government Employees", 58 Yale L. J. 1 (1948).

- i) References given by applicant.
- j) Any other appropriate source.

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PART IV

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- 2. • • • the investigative agency may refuse to disclose the names of confidential informants • • •

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PART V

- 1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.
- 2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

• • • • •

- f) membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

• • • • •

PART VI

- 1. Each department and agency of the executive branch, the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying

material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

- a) The Federal Bureau of Investigation shall check such names against the records of persons concerning whom there is a substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information."

A government employee who acquitted the General Secretary of the Communist Party of a charge of contempt of the House Committee on Un-American Activities was therefore bound to consider, in the light of the Executive Order 9835, that "activities * * * which may be considered in connection with the determination of disloyalty may include * * * sympathetic association with any * * * communist"; that if a fellow juror reported the vote and discussion of the employee to the Federal Bureau of Investigation, the "name of the confidential informant" could be withheld.

Professor Thomas L. Emerson, and his colleague, David M. Helfeld, of Yale University Law School, after careful study of the loyalty program in action, concluded:

"The cumulative influence of all these factors bears heavily upon the average government employee. He must, of course, avoid at all costs activity which may bring him within the area of disqualification established by the program. But more important, he must avoid even the *appearance or suspicion* of such activity. He is acutely aware that an F.B.I. investigation can be initiated upon the basis of a complaint made by an unfriendly or psychopathic acquaintance. He knows that such an inquiry means probing among his friends, neighbors, enemies and business acquaintances. And he knows also that any 'derogatory information,' not to say rumor and gossip, will be permanently recorded. This may well mean that he will be the first to go at the next tightening of the loyalty standards. Similarly, few government workers want to take the risk of incurring a hearing before a loyalty board. It involves time, energy, intense nervous

strain and insecurity. More, it leaves a stigma which even exoneration cannot entirely wipe out.

For these reasons, the normal government worker, faced with such conditions, avoids joining organizations, attending meetings, associating with others, reading literature, or holding views that might be considered questionable. He shrinks from making unorthodox proposals in his work or suggesting experimentation. He is under constant pressure to conform to the conventional and safe. He is placed in fear of exhibiting the very qualities most sought after by competent administrators in private industry as well as in government" (58 Yale L. J. 1, 76).

The activities of the Federal Bureau of Investigation are a source of constant worry to the federal employee. Under Executive Order 9835, the F.B.I. is charged with the political surveillance of all government employees. The rumors of wiretapping which abound in Washington have been confirmed by the Director of the Bureau himself. 58 Yale Law Journal, 401, 405. While Mr. Hoover denies the existence of a single instance "wherein a telephone was tapped in the investigation of a Federal Employee Loyalty Program case," he admits openly that wiretapping does occur in cases involving "internal security." This distinction may be apparent to Mr. Hoover; it is doubtful that the average government employee will understand it. This conduct on the part of public officials (58 Yale Law Journal, 414) is itself calculated to demoralize the ordinary public servant. "Wire tapping and other unethical devices may lead to a variety of oppressions that may never reach the ears of the courts." S. Rep. No. 1304, 76th Cong. 3rd Sess., quoted in Rosenzweig, "The Law of Wire Tapping" 33 Cornell L. Q. 93. John Lord O'Brien writes in "Loyalty Tests and Guilt by Association" (61 Harv. L. Rev. 592):

"What must be the inevitable effect of this kind of institutional practice, with its secret investigations and vast numbers of secret dossiers, upon the freedom of the individual? * * * What anxieties of mind, what

prolonged periods of worry, what restraint upon initiative, will result from their knowledge that their private lives are being secretly investigated, no one can say. But neither can anyone assert that this shadow upon their activities, however intangible and subtle, will not act as a constraint upon their freedom and their sense of independence. * * * The practice of secret investigations is an aspect of Government in which, up to now, no widespread interest has been aroused. How far, if at all, we should tolerate a policy of having our government officials build up, through secret investigations, these enormous numbers of secret dossiers dealing with the private lives of the people? For sound historical reasons the founding fathers dreaded above everything else secret activities in government operation. Must we take a different view?"

The cold record which formally describes the process through which "loyalty" has become a major factor in federal employment barely reaches the psychological realities in which prejudice and fear are rooted.

In considering the impact of the programs which we have described upon the minds of employees to determine whether they are capable of serving impartially in a case such as this, we must bear in mind certain considerations which intensify what would be the normally demoralizing and coercive impact of this process.

We are dealing with government employees, whose sensitivity to threats to tenure is notorious. We are dealing with individuals who have abandoned the prospect of obtaining non-governmental employment, and we are dealing with a compact community of such individuals. We are dealing with psychological reactions, with fears which are intensified because they are shared. Conditions affecting the morale or political independence of one or a group of government employees inevitably affect the morale and political independence of all. Moreover, these conditions affect the thinking and attitudes not only of government workers, but of all persons in the District. In short,

when this case was tried in 1947 the District of Columbia was the seat of prejudice, fear and repression.¹² Can it be seriously questioned that in such an atmosphere letter carriers Grant (R. 55) and Mackall (R. 83) who had been employed for 29 and 20 years respectively in that capacity would not at the very least have feared the loss of their jobs and pension rights had they acquitted petitioner? Would it have been "far fetched" (*Wood case, supra*, at p. 150) for all of the three post office employees who served on the jury to assume that the department which employed them would be particularly vigorous in construing and applying the Loyalty Order? See *Bertram Alexander Washington, et al. v. Clark, et al.*, 84 Fed. Supp. 964. Would it be "far fetched" to assume that the two jurors (R. 57, 83) who were employed by a "sensitive" agency, the Navy, did not fear abrupt and arbitrary dismissal should they

¹² An example of the atmosphere in the District is supplied in an article by Professor Henry Steele Commager, "Who is Loyal to America?" in Harper's Magazine, September, 1947.

"On May 6, a Russian-born girl, Mrs. Shura Lewis, gave a talk to the students of the Western High School of Washington, D. C. She talked about Russia—its school system, its public health program, the position of women, of the aged, of the workers, the farmers, and the professional classes—and compared, superficially and uncritically, some American and Russian social institutions. The most careful examination of the speech—happily reprinted for us in the Congressional Record—does not disclose a single disparagement of anything American unless it is a quasi-humorous reference to the cost of having a baby and of dental treatment in this country. Mrs. Lewis said nothing that had not been said a thousand times, in speeches, in newspapers, magazines and books. She said nothing that any normal person could find objectionable.

"Her speech, however, created a sensation. A few students walked out on it. Others improvised placards proclaiming their devotion to Americanism. Indignant mothers telephoned their protests. Newspapers took a strong stand against the outrage. Congress, rarely concerned for the political or economic welfare of the citizens of the capital city, reacted sharply when its intellectual welfare was at stake. Congressmen Rankin and Dirksen thundered and lightened; the District of Columbia Committee went into a huddle; there were demands for house-

acquit the General Secretary of the Communist Party? None of the government employees who served on the jury could immunize themselves from the tensions and pressures which existed in Washington in 1947 and which deprived them of the capacity for rendering an impartial verdict in a case of this character.

Moreover, it must be borne in mind that those who perform services for the Government to a large extent identify themselves with its policies. And when this case was tried, the policies of the Government were vigorously anti-Communist. Indeed it is accurate to say that the District of Columbia is the fountainhead of the anti-Communist hysteria in the United States. As one periodical writer observed in the summer of 1947,

“ . . . the anti-Red hysteria has reached greater intensity in Washington than in any other city of the

cleaning in the whole school system, which was obviously shot through and through with Communism.

“All this might be ignored, for we have learned not to expect either intelligence or understanding of Americanism from this element of our Congress. More ominous was the reaction of the educators entrusted with the high responsibility of guiding and guarding the intellectual welfare of our boys and girls. Did they stand up for intellectual freedom? Did they insist that high school children had the right and duty to learn about other countries? Did they protest that students were to be trusted to use intelligence and common sense? Did they affirm that the Americanism of their students was staunch enough to resist propaganda? Did they perform even the elementary task, expected of educators above all, of analyzing that much-criticized speech. Not at all. The District of Superintendent of Schools, Dr. Hobart Corning, hastened to agree with the animadversion of Representatives Rankin and Dirksen. The whole thing was, he confessed, ‘a very unfortunate occurrence,’ and had ‘shocked the whole school system’. What Mrs. Lewis said, he added gratuitously, was ‘repugnant to all who are working with youth in the Washington schools’, and ‘the entire affair contrary to the philosophy of education under which we operate’. Mr. Danowsky, the hapless principal of the Western High School, was ‘the most shocked and regretful of all’. The District of Columbia Committee would be happy to know that though he was innocent, he had been properly reprimanded!”

land. The result has been an unprecedented demoralization of government employees. From one day's end to the next, they don't know when the noiseless axe may fall—the silent dismissal without statement of charges, without advance notice and without right of appeal. In every department old faces have mysteriously disappeared without explanation." *New Republic*, July 14, 1947, 8.

See also, Andrews *Washington Witch Hunt*, *supra*, *passim*; Rogge, *Our Vanishing Liberties* (1949), Sanetón, "Dossiers For the Millions"; *The Nation*, September, 1948, p. 336; "The Case of Mr. N," *New York Post*, March 7, 1949.

It is not without reason, therefore, that a jurist who has served in the federal court in Washington, D. C., for more than ten years, recently stated:

"Government employment alone does not disqualify a juror in a prosecution for larceny, *United States v. Wood*, 299 U. S. 123, or violation of the narcotics laws. *Frazier v. United States*, 335 U. S. 497. But government employment is not commonly known to be endangered by sympathetic association with thieves or drug peddlers. It is commonly known to be endangered by sympathetic association with Communists. Government employees are therefore anxious, in various degrees, according to their temper and circumstances, to avoid seeming to sympathize with Communists. Acquittal sometimes indicates, and is often thought to indicate, that the jury sympathized with the accused. It is therefore prudent for government employees to convict an alleged Communist and imprudent to acquit him. For government employees to acquit this alleged Communist leader would have been particularly imprudent. Trial by jurors whose personal security will either actually or apparently be promoted by conviction and endangered by acquittal is not 'trial by an impartial jury' and is not due process of law."

Edgerton, J. dissenting in *Eisler v. United States*, decided April 18, 1949, unreported.

If this be the view of a jurist in the District of Columbia, it is submitted that the petitioner's challenge to government employees in this contempt proceeding brought against him by the Committee on Un-American Activities should have been sustained.

IV

No justification exists for sustaining the decision below.

It was urged by the Government in its opposition to the petition for the writ of certiorari that the petitioner was given opportunity to inquire of the government employees whether they were biased or prejudiced against him; that all had stated they would render a fair verdict.

The short answer to this contention is that the inquiry should never have been made and that, as in other cases where membership in a class is, *per se*, a ground for disqualification, government employees in a case of this sort should have been disqualified without engaging in a futile attempt to require the prospective jurors subjectively to deny what objectively is so clear.

Moreover, even if the Trial Court did not err in not finding bias implied in law, its inquiry was improperly confined to eliciting the subjective responses of the jurors without an examination of the objective circumstances. The *Crawford*, *Wood* and *Frazier* cases all condemn the method resorted to by the Trial Court and approved by the court below (R. 413-414). See *supra* pages 19-20.

These cases express the well-established view that the juror is not the judge of his own competency, impartiality and freedom from prejudice. The determination of his qualifications to serve as a juror is a judicial function, and the judge, especially in the federal courts, is not bound by the testimony of the juror. 31 *American Jurisprudence*, "Jury", Sections 109, 110. Any other principle of law

would vitiate the constitutional protection of the system of trial by jury.

In the *Burr Case*, Chief Justice Marshall stated (1 *Burr's Trial* (464)).

"Why is it that the most distant relative of a party cannot serve upon his jury? Certainly the single circumstance of relationship, taken in itself, unconnected with its consequences, would furnish no objection. The real reason of the rule is that the law suspects the relation of partiality; suspects his mind to be under a bias which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury, because it suspects prejudice; because in general persons in a similar situation would feel prejudice."

In *United States v. Chapman*, 158 F. (2d) 417 (C. C. A. 10, 1946), cert. denied 335 U. S. 860, the court stated (at p. 421):

"It is said that when a juror testifies that he believes he can, and the court finds as a matter of fact that he will, if selected, render an impartial verdict on the evidence, he is an impartial juror as required by the law. *Rice v. Emerson*, supra. A juror's answer to questions touching his state of mind is primary evidence of his competency, but the ultimate question is a judicial one for the court to decide, and in case of doubt, justice demands that the challenge be allowed. *Scribner v. State*, 3 Okl. Cr. 601, 108, p. 422, 35 L. R. A. N. S. 983; *Temple v. State*, 15 Okl. Cr. 176, 175 p. 733, 736; *Crawford v. United States*, 212 U. S. 183, 197, 29 S. Ct. 260, 53 L. Ed. 465, 15 Ann. 392; 31 Amer. Juris, p. 638. Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the high traditions of our jury system. We must make sure that the lamentations of the unsuccessful litigant is without foundation, either in fact or circumstance."

See, also, *Hillyard v. State*, 116 Tex. Cr. 557, 570; *Temple v. State*, 150 Okl. Cr. 176, 185; *Lane v. State*, 168 Ark. 528, 533; 3 Wharton, *Criminal Procedure* (1918 Ed.) 2046; Osborn, *The Mind of the Juror* (1937), page 89.

It is psychologically absurd to permit a juror to establish his own freedom from prejudice. It is equally absurd to expect a prospective juror to admit that a fear of economic reprisal might influence his decision. For to admit that he had such a fear would be publicly to confess a lack of confidence in his Government, the House Committee and the loyalty investigators and boards and to accuse them of improper practices. Such a statement in itself would invite reprisal. It is for these and related reasons that courts reject the statements of employees, victims of unfair labor practices under the National Labor Relations Act, that they were not coerced and improperly influenced by their employers. See, for example, *National Labor Relations Board v. Donnelly Garment Co.*, 330 U. S. 219.

It is important to bear in mind that a disclaimer of prejudice in a case of this kind cannot be assimilated to a situation such as one in which the prospective juror's acquaintance with the attorney on either side forms the basis for an inquiry into his bias. In such a situation it may be possible for a juror to attempt to evaluate the effect of this single, isolated fact upon his capacity to be fair. However, in a case such as this, the considerations which may sway the juror's mind are not revealed to him as a threshold matter. He is in no position to evaluate or to discount the impact upon him of such matters as the opening and closing statements of the prosecutor, the evidence adduced, the appeals which will be made to him touching upon or perhaps awakening imponderable deeply felt values—as to all of which he has no foreknowledge.

The court below (R. 414) sought to justify the trial court's rejection of petitioner's challenge of government employees for cause on the ground that petitioner sought to

impose upon government employees a "blanket disqualification". But the disqualification is no more "blanket" than the fears and prejudice which governmental activities in the area of employee "loyalty" have created. It is no more "blanket" than Executive Order 9835.

The court below (R. 414) attributed to petitioner an attempt to impose upon government employees a "bill of attainder." Disqualification for jury service in cases of this character can hardly be regarded as punishment. And the legislative imposition of far greater disabilities upon government employees has been approved by this Court. *United Public Workers v. Mitchell*, 330 U. S. 75. Moreover, the shoe is on the other foot; petitioner is faced with a serious punishment; the members of the jury were civil servants who may well be regarded in a case of this type as agents of the legislature and the other elements of the procedure by which petitioner was tried were of such an inbred character as the result of the role of the House Committee as to raise a serious question whether the entire trial was not a type of legislative trial of an individual which is forbidden by the Constitutional ban on bills of attainder. Art. I, Section 9, Cl. 3 of the Constitution.

The court below validated the trial court's procedure on the basis of the *Wood* case. We believe that the record and the decision in the *Wood* case reflect a deep concern by Chief Justice Hughes lest the removal of the disqualification announced in that case become a means of denying a fair trial to defendants in the District of Columbia in cases involving the Government. To avoid possible abuse, the Court erected clear safeguards. These have been largely ignored in the District and the decision has been converted into a shield for sheltering government employees in a "blanket" fashion, from disqualification from jury service for bias in appropriate cases. To use the *Wood* decision as a justification for what many regard as a form of jury-packing is to stand the decision on its head.

Finally, petitioner's jury cannot be justified either on the ground that the jury was drawn from the vicinage or that it represented a cross-section of the community. A defendant in a criminal case is entitled to a trial in the State where the crime shall have been committed (Constitution, Article III, Section 2, Clause 3) and by an impartial jury of the State and District wherein the crime shall have been committed (Amendment VI).

Those provisions were designed to give a defendant in a criminal case the advantage of a good reputation among his neighbors (see *United States v. Johnson*, 323 U. S. 273) but not, as was done here, to permit a prosecutor to exploit prejudice against a defendant. Compare *Murphy v. Extraordinary and Special Term*, 294 N. Y. 440. It was, among other reasons, to avoid a trial by a biased jury that the defendant in this case moved to transfer the case to another district (R. 27-32). If the trial court was unwilling to grant petitioner's motion (R. 41), it should at least have been meticulously careful to alleviate the adverse conditions under which he was forced to defend himself by eliminating government employees from the jury. In failing to do so, the trial court permitted the solid protection of Article III, Section 2, Clause 3, and the Sixth Amendment to become converted into instruments of oppression.

What we have said above applies also to any possible contention that petitioner was tried by a cross-section of the community. Trial by a cross-section, like trial in the vicinage, is a unilateral benefit to a defendant in a criminal case. When it fails to serve its purpose of producing impartial jurors and instead insures partial or biased jurors it cannot be justified under the Constitution.

To assert that considerations relating to vicinage or cross-section justify the jury imposed upon petitioner is to engage in a species of constitutional cannibalism under which the provisions relating to jury trial are used not to protect the rights of defendants but to devour them.

CONCLUSION

The prosecution of the petitioner here was not conducted by the Government as a nominal plaintiff. The prosecution was allegedly intended to vindicate the authority of the House of Representatives. At the trial, the prosecuting witness was the Government in the person of Congressmen Thomas and Mundt, as well as the chief investigator of the Committee of the House.

The petitioner was charged with an intentional and deliberate contempt of Government, or at least one of its organic bodies. He denied that charge and asked, as was his right, for a trial of the issue by a fair and impartial jury. He received a trial by a jury, the majority of whose members were the employees of the Government which had initiated the charge, prosecuted the charge, testified as to the truth of the charge, and instructed the jury as to the law applicable to the charge.

The compulsions upon the government jurors created by the very Committee which instigated and was prominently identified with the prosecution, by the Federal Bureau of Investigation and by loyalty boards were such that the jurors did not stand "indifferent". Coke on Littleton, I, 115a. (d), 156. See also Pollock and Maitland, *History of English Law* (1923), II, 619, Bacon's *Abridgment*, III, 722; Bentham, *The Elements of the Art of Packing* (1821), 219.

A charge in a criminal case that a juror is disqualified by reason of his relationship to the Government brings into play considerations involved in the origin and growth of trial by jury which lie at the very root of constitutional democracy. For the historic insistence upon jury trial as a prerogative of the people rests precisely upon the fact that it afforded the individual accused of crime the protection of 12 individuals not subject to direct influence of the crown against vengeful or arbitrary action by the crown. See Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury," 39

Harv. L. Rev. 917, 923. See also Lesser, *Historical Development of the Jury System* (1894), 143; von Moschzisker, "Historic Origin of Trial by Jury," 70 U. of Pa. Law Rev. 1, 85.

This is a political case in a double aspect. The interest which is sought to be vindicated here is not that of a nominal sovereign seeking to redress an injury to a private person in the public interest but that of the Government itself asserting an injury to itself and seeking to impose punishment for that reason. And the defendant is identified with an opposition political party. The history of trial by jury and its vitality as an institution is in large measure explained by the fact that it was a bulwark of political liberty.¹³

¹³ See Blackstone's Com. Bk. IV, p. 34; Phillips, *Powers and Duties of Juries*, p. iv; Forsythe, *The History of Trial by Jury* (2nd Ed., 1878), p. 363. Englishmen virtually rediscovered the jury system and fought for its preservation as a bulwark of popular liberty during the sedition libel controversies of the eighteenth century when an effort was made to confine the role of the jury in these political cases to a determination of whether the alleged seditious libel was in fact circulated. Lord Mansfield's doctrine that it was the province of the court alone to judge of the criminality of a libel, "was wholly subversive of the rights of juries in cases of libel." May, *Constitutional History of England* (1899), II, p. 114. The author further states: "Trial by jury was the sole security for the freedom of the press; and it was found to have no place in the law of England." The struggle to confirm the right in juries to judge of both law and fact was not wont until the passage of Fox's Libel Act in 1792. May, *supra*, 122. Thomas Erskine who played such a prominent role in the defense of political liberties, threatened by the sedition libel prosecutions, spoke for all liberty-loving Englishmen when he said that the system of trial by jury was "intended by the wise founders of the government, to be a protection to the lives and liberties of Englishmen, against the encroachments and perversions of authority in the hands of fixed magistrates. * * * If the jury by an appeal to their consciences are to be thus limited in the free exercise of that right which was given them by the constitution, to be a protection against judicial authority where the weight and majesty of the crown is put into the scale against an obscure individual, the freedom of the press is at end." *The Trial of Stockdale*, to which is subjoined an argument in support of the Rights of Juries (1790), pp. 117, 125, 191.

Our institutions, were founded by men who believed that the system of trial by jury was basic to political liberty. In the Declaration of Independence, the colonists "submitted to a candid world" that a despotic king had deprived them "of the benefits of Trial by Jury". And while the Constitution of 1789 provided that the "Trial of all Crimes except in Cases of Impeachment, shall be by jury", so jealous were the people of this fundamental right that they compelled the additional provision in the Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed * * *". Elliot's *Debates* (2nd ed.), II, 109; III, 541, 542, 544, 545, 546; IV, 143, 148, 154, 166, 171. Moreover the observation of and experience with the corruption and intimidation of jurors in England.¹⁴

¹⁴ The jury system in the reign of Queen Elizabeth is described in David Hume's *History of England*, published on the eve of the American Revolution (1764-1772). That work states (Lovell ed. n. d., Vol. IV, pp. 349-350):

"The queen's menace of trying and punishing Haywarde for treason could easily have been executed, let his book have been ever so innocent. While so many terrors hung over the people, no jury durst have acquitted a man when the court was resolved to have him condemned. The practice, also, of not confronting witnesses with the prisoner, gave the crown lawyers all imaginable advantage against him. And indeed there scarcely occurs an instance during all these reigns, that the sovereign or the ministers were ever disappointed in the issue of a prosecution. Timid juries, and judges who held their offices during pleasure, never failed to second all the views of the crown. And as the practice was anciently common of fining, imprisoning, or otherwise punishing the jurors, merely at the discretion of the court, for finding a verdict contrary to the direction of these dependent judges, it is obvious that juries were then no manner of security to the liberty of the subject." See also Trevelyan, *English Social History* (1944), p. 60.

had impressed upon the Founders the fundamental necessity for impartial jurors.¹⁵

We submit that petitioner's constitutional rights to an impartial jury were denied here. What is involved here, however, are more than petitioner's personal rights. The preservation of the constitutional right to a trial by a fair and impartial jury protects in fact essential social processes that make constitutional government possible. "A government which sells or denies justice fails in one of its chief functions." Pound, *Law and the Administration of Justice*. (Nanking, 1947), p. 72. Professor Chafee, a close student of the events of the 1920's notes that the "human machinery broke down at a second point—the jury". Chafee, *Free Speech in the United States* (1941) p. 70. Noting the failure in the administration of justice as reflected in the selection of biased juries in cases involving civil liberties, Professor Chafee concludes (73): "The solution should not only give justice, but be so plain as to satisfy all classes, in so far as that is possible, that they are getting justice." Compare *Ballard v. United States*, 329 U. S. 187, 195.

¹⁵ "It is a maxim universally admitted, that the safety of the subject consists in having a right to a trial as free and impartial as the lot of humanity will admit of." Holmes at the Massachusetts Convention, Elliot's *Debates*, II, 109; "They may be tried by the most partial powers, by their most implacable enemies, and be sentenced and put to death, with all the forms of a fair trial * * * (the) right to challenge partial jurors * * * is as valuable as the trial by jury itself." Patrick Henry in the Virginia Convention, Elliot's *Debates*, III, 542. "What made the people revolt from Great Britain? The trial by jury, the great safeguard of liberty, was taken away, and a stamp duty was laid upon them." McDowall in the North Carolina Convention, Elliot's *Debates*, IV, 143. "Jurors are called the bulwarks of our rights and liberty; and no country can ever be enslaved as long as those cases which affect their lives and property are to be decided, in a great measure, by the consent of twelve honest, disinterested men, taken from the respectable body of yeomanry." Spencer in the North Carolina Convention, Elliot's *Debates*, IV, 154.

The standards of due process of law, the provisions of Article III, Section 2, clause 3 and of the Sixth Amendment as well as proper standards for the administration of criminal justice in the Federal courts (*McNabb v. United States*, 318 U. S. 332; *Fay v. New York*, 332 U. S. 261), all require that the petitioner's conviction be set aside.

Respectfully submitted,

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APPENDIX

1. CONSTITUTION, ARTICLE III, SECTION 2, PARAGRAPH 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be such Place or Places as the Congress may by Law have directed.

2. CONSTITUTION, AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

3. SECTION 121 (b), LEGISLATIVE REORGANIZATION ACT OF 1946.

Legislative Reorganization Act of 1946, 79-2, Public No. 601, ch. 753, section 121, establishing the House Committee as a standing committee of the House of Representatives and defining the powers and duties of that committee:

* * * * *

RULE X

STANDING COMMITTEES.

(a) There shall be elected by the House at the commencement of each Congress, the following standing committees: * * * 17. Committee on Un-American Activities to consist of nine members.

* * * * *

RULE XI

POWERS AND DUTIES OF COMMITTEES.

• • • (q) (1) Committee on Un-American Activities.

(A) UN-AMERICAN ACTIVITIES.

(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendants of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpoenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

• • • • •

On January 3, 1947, the House of Representatives by resolution (H. Res. 5) adopted as the rules of the House "all applicable provisions of the Legislative Reorganization Act of 1946" and the rules of the House of Representatives of the Seventy-ninth Congress as the rules of the House of the Eightieth Congress (93 Cong. Rec. 36).

4. EXECUTIVE ORDER No. 9835.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT.

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I**INVESTIGATION OF APPLICANTS**

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

- a. Federal Bureau of Investigation files.
- b. Civil Service Commission files.
- c. Military and naval intelligence files.
- d. The files of any other appropriate government investigative or intelligence agency.
- e. House Committee on un-American Activities files.
- f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.
- g. Schools and colleges attended by applicant.
- h. Former employers of applicant.
- i. References given by applicant.
- j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II

INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

- a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing de-

partment or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

PART III

RESPONSIBILITIES OF CIVIL SERVICE COMMISSION

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed

necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

- (1) Advise all departments and agencies on all problems relating to employee loyalty.
- (2) Disseminate information pertinent to employee loyalty programs.
- (3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.
- (4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney Gen-

eral, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV

SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

PART V

STANDARDS

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of

another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents

and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN

THE WHITE HOUSE

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and resolution involved	2
Statement	4
Argument	8
Conclusion	16

CITATIONS

CASES:

<i>Barsky v. United States</i> , 167 F. 2d 241, certiorari denied, 334 U.S. 843	9
<i>Colegrove v. Greene</i> , 328 U.S. 549	10
<i>Eisler v. United States</i> , No. 255, O. T. 1948, certiorari de- nied November 8	9
<i>Fields v. United States</i> , 164 F. 2d 97, certiorari denied, 332 U.S. 851	10
<i>Frazier v. United States</i> , No. 44, this Term, decided De- cember 20, 1948	15
<i>Hall, In re</i> , 296 Fed. 780, petition dismissed, 2 F. 2d 1016	13
<i>Josephson v. United States</i> , 165 F. 2d 82, certiorari denied, 333 U.S. 838	9
<i>Norris v. Hassler</i> , 23 Fed. 581	13
<i>Saunders v. Wilkins</i> , 152 F. 2d 235, certiorari denied, 328 U.S. 870	10
<i>Wilder v. Welsh</i> , 1 MacArthur 566 (Sup. Ct. D.C.)	13

UNITED STATES CONSTITUTION:

Article I, Sec. 5	9, 13
-------------------------	-------

STATUTE AND RULES:

R. S. 102, as amended (2 U.S.C. 192)	3
Rule 21(a) F. R. Crim. P.	14
House of Representatives Rule XI(q) (2), as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st sess.)	3

MISCELLANEOUS:

Executive Order 9835	14
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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 426

EUGENE DENNIS, *Petitioner*

v.

UNITED STATES OF AMERICA

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 408-416) has not yet been reported. The memorandum opinion of the district court denying petitioner's motion to dismiss the indictment appears at pp. 19-27 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered October 12, 1948 (R. 417). On October 30, the Chief Justice extended the time to file a peti-

tion for a writ of certiorari to November 29, 1948 (R. 419), and the petition was filed on November 27, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner, who deliberately failed to appear before the House Un-American Activities Committee pursuant to subpoena, has standing to challenge the constitutionality of the Committee's authority; and if so, whether the House Resolution which authorized the Committee is constitutional.

2. Whether petitioner ~~has~~ standing to challenge the right of a member of the Committee to be a member of the House of Representatives.

3. Whether a wilful default within the meaning of R.S. 102 requires an evil purpose in addition to deliberate and intentional conduct.

4. Whether a letter which petitioner sent to the Committee in lieu of appearance, in which he asserted that the Committee had no constitutional validity, was properly excluded as being irrelevant to the issue of petitioner's deliberate default.

5. Whether petitioner could properly be served with a subpoena by the Committee at the time he was voluntarily appearing before the Committee.

6. Whether government employees could properly serve on the jury which tried petitioner.

STATUTES AND RESOLUTION INVOLVED

R.S. 102, as amended (2 U.S.C. 192), provides:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

House of Representatives Rule XI(q)(2), as amended by Section 121(b) of the Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 828, and thereafter adopted by the House of Representatives (H. Res. No. 5, 80th Cong., 1st sess.), provides:

The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United

States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

For the purpose of any such investigation the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member.

STATEMENT

On April 30, 1947, an indictment was filed against petitioner charging a violation of R.S. 102 in that, having been duly summoned to appear

and give testimony before the Committee on Un-American Activities of the House of Representatives, he failed to appear and therefore willfully made default (R. 3-4).

The evidence may be summarized as follows:

During March 1947, the Committee on Un-American Activities had under consideration two bills relating to the Communist Party (R. 174). On March 18, 1947, petitioner, the general secretary of the Communist Party, requested an opportunity to appear on behalf of the National Committee of the Party. That request was granted. Petitioner was later informed that, as he had requested, he had been allotted two hours to testify before the Committee. (R. 165-166.)

On March 26, 1947, petitioner voluntarily appeared before the Committee. He gave his name as Eugene Dennis and was then asked whether that was his true name, whether he had any other name, and whether he had used any other name on a passport. Petitioner stated that he was there under the name of Eugene Dennis and would testify only under the name of Eugene Dennis. He refused to answer any questions about his name and refused to state where or when he was born. (R. 168, 219-220.) After about five minutes of this "wrangling over the question of names," the Chairman of the Committee directed that a subpoena be served on petitioner (R. 168, 219-220).

The chief investigator for the Committee thereupon approached petitioner to serve him with a subpoena. Petitioner stood up and said, "In the name of the American people, I hold this committee in contempt" (R. 221). The investigator went up to petitioner and endeavored to hand him a subpoena calling for his appearance on April 9, and stated, "Mr. Dennis, I have a subpoena here for you to appear on April 9" (R. 221). Petitioner folded his arms. The investigator laid the subpoena on petitioner's arm and petitioner turned and walked away (R. 221). Petitioner "tossed [the subpoena] on the table" from which it was later taken by a newspaper man who was present at the time (R. 241-243).

On April 7, the Committee sent petitioner a telegram reminding him that he was under a duty to appear in response to the subpoena served on March 26 (R. 173-174).

On the morning of April 9, petitioner's name was called before the Committee. He did not respond. (R. 250.) Mr. Lapidus, who described himself as Secretary of the Communist Party and attorney for petitioner, stood up and said he wanted to read a statement by petitioner¹ (R. 251-252). He was told to leave the statement with the Committee (R. 252). The presiding member of the Committee (see R. 249) stated that the Com-

¹ The statement was in the form of a letter from petitioner to the Committee (see R. 396-407).

mittee should consider the statement in executive session and determine whether it gave valid reasons for not answering the subpoena (R. 252).

The Committee reported to the House of Representatives that petitioner had been duly served with a subpoena, that a telegram had been sent to him reminding him of his duty to appear, that he had failed to appear, and that his wilful and deliberate refusal was a violation of a subpoena in contempt of the House of Representatives (R. 159-162). The House certified the report of the Committee to the United States Attorney for the District of Columbia for action (R. 158-159), and petitioner was thereafter indicted (R. 3-4).

Petitioner moved to dismiss the indictment on the grounds that the resolution prescribing the authority of the Committee was unconstitutional, and that one of the members of the Committee, John E. Rankin, was not properly a member of the House of Representatives (R. 5-7). He made a motion for the taking of testimony in support of his allegations with respect to the unconstitutionality of the Committee (R. 15-19). Petitioner also moved for an examination of the grand jury minutes on the ground that his letter to the Committee expressing the reasons for his refusal to appear on April 9 had not been presented to that body (R. 7-14). Petitioner's motions were denied, the district court holding that the Committee was properly constituted, that the indictment charged an

offense, and that, as a matter of law, petitioner's letter was not a bar to prosecution for his failure to attend (R. 19-27).

During the trial, references by petitioner's counsel to petitioner's letter, asserting his reasons for failure to appear before the Committee and attempts to prove the assertions made in that letter as to the alleged unconstitutionality of the Committee, were excluded on the theory that since wilful default, as used in R.S. 102, meant merely deliberate and intentional default, petitioner's alleged good faith reliance on the advice of counsel as to the unconstitutionality of the Committee was irrelevant (R. 110-124, 130-144, 189-198, 213-216, 270-272, 277-283).

Petitioner was convicted (R. 342). Before imposing sentence, the trial judge gave him an opportunity to purge himself of contempt by testifying before the Committee, but petitioner indicated that he did not desire to do so (R. 360-361). He was sentenced to imprisonment for one year and fined \$1,000 (R. 362). On appeal, the judgment was affirmed (R. 417).

ARGUMENT

1. Petitioner's attack on the constitutional validity of the Committee on Un-American activities (Pet. 13, 16-19, 30-36) raises issues which were rejected by the Court of Appeals for the Second Circuit in *Josephson v. United States*, 165 F. 2d

82, certiorari denied, 333 U. S. 838, and by the Court of Appeals for the District of Columbia Circuit in *Barsky v. United States*, 167 F. 2d 241, certiorari denied, 334 U. S. 843, petition for rehearing pending.² On that question, we rest on those opinions and our brief in opposition in the *Josephson* case, No. 535, O. T. 1947. As in the *Josephson* case, we also question the standing of petitioner, who refused to appear before the Committee at all, to challenge the authority of the Committee to propound questions to him.

2. Petitioner also attacks the legality of the Committee on the ground that Congressman Rankin should not properly be a member of the House of Representatives (Pet. 15-16, 23-25, 29, 43-51). He argues that Congress should have exercised the power conferred upon it by the Fourteenth Amendment to reduce the basis of the representation of those States abridging the right to vote and that, had it done so, the state of Mississippi would have been entitled to four Representatives, rather than seven; and that, since Congress improperly allowed seven Representatives to Mississippi, no Representative from that state is properly a member of the House.

Manifestly, petitioner has no standing to raise that issue. Under Article I, Section 5 of the Con-

² See also *Eisler v. United States*, No. 255, O. T. 1948, certiorari granted, November 8.

stitution, each House is the "Judge of the Elections, Returns and Qualifications of its own Members." Issues as to the apportionment of Representatives are political ones beyond the power of a court to review. *Colegrove v. Greene*, 328 U. S. 549; *Saunders v. Wilkins*, 152 F. 2d 235 (C. C. A. 4), certiorari denied, 328 U. S. 870. Certainly, petitioner, who was merely summoned before a Committee of the House, cannot thus collaterally challenge the decision of Congress as to its own membership.

3. Petitioner contends (Pet. 14, 22-23, 36-38) that the term "wilfully," as used in R.S. 102, should be construed to mean with an evil purpose and not, as the district court construed it, to mean deliberate and intentional default as distinguished from accident or inadvertence (see R. 143). That issue was fully discussed and was determined against petitioner's position in *Fields v. United States*, 164 F. 2d 97, 100 (App. D. C.), certiorari denied, 332 U. S. 851. As the district court said in ruling on the question in connection with the motion to exclude references to petitioner's letter to the Committee allegedly expressing his reasons for failing to appear (R. 143-144):

* * * A broader construction which would include the word to mean in bad faith or with a bad purpose, as contended by the defendant's counsel, would in practice nullify the sanctions for compulsory attendance of witnesses

before congressional committees. Under such a construction an unwilling witness would need only to say, when he is put to trial, that upon advice of counsel he believed the committee to be illegally constituted or that the inquiry was beyond the scope of the creating resolution. Upon such a showing and upon an instruction to the jury that good faith or absence of bad purpose constituted a defense, a defendant would inevitably escape punishment, and a committee could never obtain the testimony of an unwilling witness.

4. Petitioner's contention that the trial court erred in excluding from evidence his letter to the Committee allegedly explaining the reasons for his non-appearance (Pet. 14, 22-23, 27, 40) depends on the validity of the contentions discussed above, and falls with the failure of those premises. The letter, which is set forth in full in the record as defendant's proposed Exhibit 5 (R. 396-407), was not really an excuse for non-attendance; it was in reality a challenge to the legality of the Committee. As we have shown, the legal contentions there made are improper, and petitioner had no standing to make them. If the trial court had permitted the letter to go before the jury it would, under its construction of the term "wilful"—a construction which, as we have shown, is clearly correct—have been bound to instruct the jury that the letter could not be considered as bearing on the issue of wilfulness. Since the letter was clearly irrelevant to the one issue as to which petitioner wished to

have it introduced, no purpose would have been served by admitting it in evidence.

Furthermore, to have allowed the letter in evidence would have brought before the jury the legal issues with respect to the legality of the Committee which, as we have shown, petitioner could not properly raise as a defense to the prosecution. In fact, at the trial petitioner's counsel specifically asserted that he had a right to prove, not only that petitioner had made such contentions as the reason for his non-appearance, but that his contentions in this respect were correct (R. 136; see also petitioner's offer of proof, R. 383-395). Manifestly, petitioner could not thus put before the jury indirectly that which he was properly excluded from attempting to prove directly. The letter would have brought into the trial wholly irrelevant issues which had no bearing on the issue before the jury, i.e., whether petitioner deliberately and intentionally failed to appear before the Committee pursuant to the subpoena. The trial judge therefore properly excluded the letter and all references thereto.³

³ For the same reasons, the letter had no bearing on the issues before the grand jury and need not have been produced before that body, or before the House of Representatives. Far from showing lack of wilfulness, the letter merely confirms the fact that petitioner's failure to appear was deliberate and intentional. At the time of the Committee's report to the House, the House was informed that petitioner had sent an attorney on the day he was summoned to appear (R. 255).

5. Relying on *Wilder v. Welsh*, 1 MacArthur 596 (Sup. Ct. D. C.), petitioner contends (Pet. 19-20, 38-39) that, as a witness before a Committee of the House of Representatives on March 26, 1947, he was immune from service of the subpoena. Petitioner, however, failed to raise that issue on the return date of the subpoena and therefore waived it, if it was available to him. *In re Hall*, 296 Fed. 780 (S. D. N. Y.), petition dismissed, 2 F. 2d 1016 (C. C. A. 2).

In any event, the case upon which petitioner relies held merely that a witness before a congressional committee has no greater privilege than a member of Congress. Under Article I, Section 5 of the Constitution, each house of Congress may compel the attendance of its own members. Furthermore, the exemption of a witness or party from service of process does not extend to service of a subpoena to testify in the same matter as to which he is already in attendance. *Norris v. Hassler*, 23 Fed. 581 (C. C. D. N. J.). Petitioner was subpoenaed to testify before the same Committee to which he had voluntarily presented himself to give testimony. The reasoning of the *Norris* case applies to the service of a subpoena on him at that time.

6. Petitioner contends (Pet. 14, 21-22, 27, 40-43) that it was error to deny his challenge to the jurors who were government employees on the ground

that the loyalty order with respect to government employees (Executive Order 9835) would prevent them from fairly judging the case, in that a verdict in petitioner's favor might be construed as sympathetic association with Communists (R. 64-65).⁴ The prospective jurors were, however, extensively questioned on the voir dire for any signs of prejudice (R. 46-106). Jurors who had read about the case and formed opinions were excused for cause (R. 72-75, 87), as was a juror who belonged to an anti-communist organization (R. 66). Of the jury as finally drawn (see R. 105), only three had read of the case in the newspapers, and two of these stated that such reading merely consisted of "scanning the headlines." All three stated that such information as they had about the case would not influence their judgment. (R. 66, 69, 88.)

Seven of the jurors selected were government employees: three worked for the Post Office Department (R. 55, 76, 83), one was a card punch operator in the Bureau of Supplies of the Navy Department (R. 56), one was employed at the Naval Gun Factory (R. 89), one was employed as

⁴ Petitioner made a motion under Rule 21(a) of the Federal Rules of Criminal Procedure for a change of venue from the District of Columbia on the same ground (R. 27-32). The motion was denied, the court stating that it was not satisfied that there exists in the District of Columbia "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" (R. 41).

a clerk in the Department of Commerce (R. 67), and one was employed as a press helper at the Government Printing Office (R. 93). Each of the government employees was specifically asked if he felt that a not guilty verdict would subject him to investigation of his loyalty and each replied that he was certain that it would not (R. 55, 56, 68, 76-77, 84-85, 89-90, 93).

This Court has recently held that the mere fact of government employment does not disqualify a juror from sitting in a criminal prosecution; it held that government employees, like others, are subject to disqualification only for "actual bias." *Frazier v. United States*, No. 44, this Term, decided December 20, 1948. Here, actual bias by the government employee jurors was not shown; on the contrary, the jurors were carefully questioned to determine that there was no bias. Under the circumstances government employment *per se* was properly rejected as a basis for disqualification of the jurors.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

ALEXANDER M. CAMPBELL,
Assistant Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

January, 1949.

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No. 14

In the Supreme Court of the United States

October Term, 1949

ROBERT D. LEE, PETITIONER

VS.
UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS IN THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED FOR THE UNITED STATES

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	2
Statement.....	2
Summary of argument.....	15
Argument:	
Petitioner failed to establish such bias against him on the part of Government employees in the circumstances of this case that the trial court should have excluded them from the jury which tried him.....	16
Conclusion.....	31
Appendix.....	32

CITATIONS

Cases:

<i>Aldredge v. United States</i> , 283 U. S. 308.....	25
<i>Connors v. United States</i> , 158 U. S. 408.....	29
<i>Crawford v. United States</i> , 212 U. S. 183.....	19
<i>Frazier v. United States</i> , 335 U. S. 497.....	15, 20, 21, 29
<i>Glasser v. United States</i> , 315 U. S. 60.....	29
<i>Holt v. United States</i> , 218 U. S. 245.....	30
<i>People v. Reyes</i> , 5 Cal. 347.....	25
<i>Press Pub. Co. v. McDonald</i> , 73 Fed. 440, certiorari denied, 163 U. S. 700.....	22
<i>Reynolds v. United States</i> , 98 U. S. 145.....	29
<i>Spies v. Illinois</i> , 123 U. S. 131.....	29
<i>Thiel v. Southern Pacific Co.</i> , 328 U. S. 217.....	30
<i>United States v. Wood</i> , 299 U. S. 123.....	15, 17-19, 21, 26, 30

Statute and Regulations Involved:

R. S. 102, as amended (2 U. S. C. 192).....	2
28 U. S. C. (1946 ed.) 424.....	20
28 U. S. C. 1870.....	20

Miscellaneous:

Cardozo, <i>Nature of the Judicial Process</i>	26
Executive Order No. 9835, 12 F. R. 1935.....	5, 28
F. R. Crim. P., Rule 24 (b).....	12
Wigmore, <i>Evidence</i> , § 2571.....	28

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 14

EUGENE DENNIS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 408-416) is reported at 171 F. 2d 986.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1948 (R. 417). The petition for a writ of certiorari was filed on November 27, 1948, within the time as extended by order of the Chief Justice, and was granted on June 27, 1949, "limited to the question whether government employees could properly serve on the jury which tried petitioner" (R. 419). The jurisdiction of this Court rests on 28

U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether Government employees could properly serve on the jury which tried petitioner for a violation of R. S. § 102 (2 U. S. C. 192) in failing to respond to a subpoena issued by the House Committee on Un-American Activities.

STATEMENT

On April 30, 1947, petitioner was indicted in the United States District Court for the District of Columbia for a violation of R. S. § 102, in that, having been duly summoned to appear and give testimony before the Committee on Un-American Activities of the House of Representatives, he failed to appear and therefore wilfully made default (R. 3-4).

The evidence adduced at the trial showed that during March 1947, the Committee on Un-American Activities had under consideration two bills relating to the Communist Party (R. 174). On March 18, 1947, petitioner, the general secretary of the Communist Party, requested an opportunity to appear on behalf of the National Committee of the Party. That request was granted. Petitioner was later informed that, as he had requested, he had been allotted two hours to testify before the Committee. (R. 165-166.)

On March 26, 1947, petitioner voluntarily appeared before the Committee. He gave his name

as Eugene Dennis and was then asked whether that was his true name, whether he had any other name, and whether he had used any other name on a passport. Petitioner stated that he was there under the name of Eugene Dennis and would testify only under the name of Eugene Dennis. He refused to answer any questions about his name and refused to state where or when he was born. (R. 168, 219-220.) After about five minutes of this "wrangling over the question of names," the Chairman of the Committee directed that a subpoena be served on petitioner (R. 168, 219-220).

The chief investigator for the Committee thereupon approached petitioner to serve him with a subpoena. Petitioner stood up and said, "In the name of the American people, I hold this committee in contempt" (R. 221). The investigator went up to petitioner and endeavored to hand him a subpoena calling for his appearance on April 9, and stated, "Mr. Dennis, I have a subpoena-here for you to appear on April 9" (R. 221). Petitioner folded his arms. The investigator laid the subpoena on petitioner's arm and petitioner turned and walked away (R. 221). Petitioner "tossed [the subpoena] on the table," from which it was later taken by a newspaper man who was present at the time (R. 241-243).

On April 7, the Committee sent petitioner a telegram reminding him that he was under a duty

to appear in response to the subpoena served on March 26 (R. 173-174):

On the morning of April 9, petitioner's name was called before the Committee. He did not respond (R. 250). Mr. Lapidus, who described himself as Secretary of the Communist Party and attorney for petitioner, stood up and said he wanted to read a statement by petitioner¹ (R. 251-252). He was told to leave the statement with the Committee (R. 252). The presiding member of the Committee (see R. 249) stated that the Committee would consider the statement in executive session and determine whether it gave valid reasons for not answering the subpoena (R. 252).

The Committee reported to the House of Representatives that petitioner had been duly served with a subpoena, that a telegram had been sent to him reminding him of his duty to appear, that he had failed to appear, and that his wilful and deliberate refusal was a violation of a subpoena in contempt of the House of Representatives (R. 159-162). The House certified the report of the Committee to the United States Attorney for the District of Columbia for action (R. 158-159), and petitioner was thereafter indicted (R. 3-4).

Prior to trial, petitioner filed a motion and supporting affidavit for a change of venue on the

¹ The statement was in the form of a letter from petitioner to the Committee (see R. 396-407).

ground that he could not obtain a fair and impartial trial in the District of Columbia. He asserted that government employees, who comprise a large part of the District's population, would be afraid to vote for the acquittal of petitioner, a well-known Communist leader, since such action might be construed as such "sympathetic association" with Communism as would endanger their employment and expose them to consequent stigma under the "Loyalty Order" (Executive Order 9835, issued March 21, 1947, 12 F. R. 1935). (R. 27-32.) The motion was denied (R. 41).

Six government employees were among the 12 prospective jurors who were first called to the box and sworn for the *voir dire* examination. In addition to the examination of the jurors collectively on such matters as acquaintance with counsel, members of the Committee on Un-American Activities, employees of the Department of Justice, etc. (R. 47-51),² supplementary questions were addressed individually to the six government employees by defense counsel. Juror Borelli stated that although he had worked for the Federal Works Agency since 1938, he would

² In view of the explicit instruction (R. 47) that jurors should remain silent unless they intended an answer in the affirmative, the repeated notations in the record of the *voir dire* that "there was no response" indicate, of course, that the several answers of the jurors to the preceding questions were in the negative.

not be influenced in any way in favor of the Government or against petitioner (R. 51-52). Mr. David, a mechanic employed by the Federal Works Agency, stated that he had read of the investigation of the loyalty of government employees under the Executive Order but that he did not expect to be questioned in the event that he voted for petitioner's acquittal. He was excused for cause, however, on the ground that he was a member of the Anti-Communist Association. (R. 53-54, 59, 65-66.) Mrs. Furlow, an employee of the Bureau of the Census for five years, denied that she would be influenced or embarrassed in any way by the loyalty test (R. 54-55). Mr. Grant, a letter carrier employed in the City Post Office for 29 years, was asked by petitioner's counsel: "Do you feel this loyalty test would in any way render you subject to an inquiry if you found a verdict of not guilty in this case," and he replied, "It would not" (R. 55). Likewise, Mrs. Grigsby, a card punch operator in the Bureau of Supplies and Accounts of the Navy Department for four and a half years, stated she did not feel that the loyalty test would in any way affect her judgment in the case (R. 56). Mrs. Groce, an elevator operator at the Veterans Administration for five years, also stated that the loyalty investigation would not prevent her from acquitting petitioner (R. 56-57).

The jurors were then questioned by defense counsel about any connections they might have

with such organizations as the Ku Klux Klan, Knights of the White Camelia, the National Association of Manufacturers, or any group which has "taken a definite stand against the Communist Party, of which the defendant is an officer," and, with the exception of Mr. David, who was excused for cause (*supra*, p. 6), all replied in the negative (R. 59-60, 61). Several jurors answered that they read the Washington Times-Herald and that despite attacks by that newspaper upon the Communist Party, they could give petitioner a fair and impartial trial (R. 60-61). Petitioner's counsel also asked: "It is in my mind that someone might feel—I ask you Government employees that particularly, that even though you concluded a verdict of not guilty was called for in this case, you might still be afraid that that would be considered as having friendly association or friendliness with an officer of the Communist Party. Are you sure that would not affect your minds in any way?" The answer was in the negative. (R. 62.) The jurors also indicated, in response to the court's question, that they could think of no reason why they could not render a fair and impartial verdict solely on the evidence and the instructions given by the court (R. 64).

Despite these answers, petitioner challenged all government employees for cause (R. 64-65). The challenge was denied (R. 65) and the selection of a jury continued. Mrs. Holford, a clerk in the

Department of Commerce, who replaced Mr. David in the box (R. 66-67), was questioned as follows (R. 68):

Mr. McCABE [petitioner's counsel]. You heard the questions I put to the other members of the panel, and I will ask you whether in your past history, association, or feelings or prejudices there is anything which would prevent you from going to that jury box and rendering a fair and impartial verdict in accordance with the evidence as you interpret it?

Juror HOLFORD. No.

Mr. McCABE. You are familiar with the Government loyalty oath investigation?

Juror HOLFORD. I believe I am. I have heard something of it.

Mr. McCABE. Do you feel that rendering a verdict of not guilty in this case, if you come to that conclusion, it would stop you, any criticism or embarrassment among your fellow employees?

Juror HOLFORD. None whatsoever.

Mr. McCABE. Or by your superiors?

Juror HOLFORD. No.

Mr. McCABE. You would not have any thought that would be taken as evidence of friendliness to communism?

Juror HOLFORD. No; I am not worried about my job that way.

Mr. McCABE. I have no further questions.

Mr. Fihelly [government counsel]. May I ask the same one I did? I take it that if the evidence in this case showed the

guilt of this defendant under the instructions on the law that you could render such a verdict.

JUROR HOLFORD. Yes.

The Government exercised its first preemptory challenge to exclude Mrs. Darby, a housewife and former government employee (R. 52, 69). Mr. Howard, who took her place in the box, was not asked his occupation and presumably he was not a government employee. He stated that he would not be affected in any way by the fact that petitioner was a Communist. (R. 69-71.)

Petitioner peremptorily challenged Mrs. Furlow, a government employee (R. 71; see p. 6, *supra*). A non-government employee who was then called indicated uncertainty as to whether she could render an impartial verdict in a case involving a Communist, and, upon the court's invitation, petitioner's counsel challenged her and she was excused (R. 71, 74-75). Mr. Jones, a post office clerk for two or three years, replaced her and the following colloquy occurred (R. 76-77):

Mr. McCABE. Now, Mr. Jones, you have heard, have you, of the loyalty test or loyalty investigation which is going on to test the loyalty of Government employees? Have you heard of that?

Mr. JONES. Yes, I have.

Mr. McCABE. Are you aware of the fact that one of the tests that might disqualify or prevent you from Government employ-

ment is friendly association with any Communist person or any Communist organizations?

Mr. JONES. That would not. I am a Civil Service employee. I have taken an examination for my job.

Mr. McCABE. Yes. Are you aware of the fact that, despite any Civil Service protection, still a finding that you were in friendly association with any Communist or Communist organization would render you ineligible to continue in your Government position?

Mr. JONES. It would not.

Mr. McCABE. What?

Mr. JONES. It would not.

Mr. McCABE. Are you aware of the fact that it would render you, despite your Civil Service protection, ineligible?

Mr. JONES. No, I don't think it will.

Mr. McCABE. Do you have any fear, any thought, that if you were selected as a juror in this case and you came to a decision, after hearing testimony, arguments of counsel, and the instructions of his Honor, that the Government had not made out a case beyond a reasonable doubt of the guilt of this defendant, and that you had honestly reached that conclusion—would the fact that you would go back among your fellow Government employees and perhaps have to answer questions as to how you found a Communist not guilty embarrass you or affect your consideration of the case?

Mr. JONES. No.

Mr. McCABE. You say "No"?

Mr. McCABE. No.

Mr. McCABE. You are sure of that?

Mr. JONES. Yes, sir.

The Government next challenged peremptorily Mr. Evans, a non-government employee (R. 79). Mr. Lineberger, self-employed as a general hauler, who had no business with the Government, took Evans' place in the box. He stated that he had no such prejudices against Communists or the Communist Party as would prevent him from rendering an impartial decision. (R. 80-81.)

Petitioner exercised his second peremptory challenge to exclude Mr. Borelli, a Federal Works Agency employee (R. 82; see p. 5, *supra*). Mr. Mackall, a mail carrier with 20 years' service, who replaced Borelli, stated that he had no prejudice against Communists or the Communist Party (R. 83). He was questioned specifically as follows (R. 84-85):

Mr. McCABE. Is there anything in your associations, thoughts, political or economic ideas which would put a Communist at a disadvantage when you came to consider his case?

Mr. MACKALL. No, sir.

Mr. McCABE. If you came to the conclusion, after hearing the evidence, the arguments of counsel, and the charge of this Court, that a ~~verdict~~ of not guilty was to

be rendered, would you hesitate to render such a verdict because this man is a Communist?

Mr. MACKALL. No, sir.

Mr. McCABE. You are familiar with the Government loyalty test now going on?

Mr. MACKALL. Yes, sir.

Mr. McCABE. You are familiar with the fact that friendly association with Communists might render you subject to dismissal from your employment?

Mr. MACKALL. Yes, sir.

Mr. McCABE. Would that have any effect upon you in the consideration of the verdict in this case?

Mr. MACKALL. No, sir.

Mr. McCABE. I mean, if you found that a verdict of not guilty was warranted, you could go back among your fellow Government workers without any apologies for your verdict?

Mr. MACKALL. Yes, sir.

Mr. McCABE. Do you think it might subject you to any criticism or investigation in your department because you were a member of a jury which found a verdict of not guilty where a Communist was involved?

Mr. MACKALL. I do not think so.

Mr. McCABE. Do you have any doubts about it?

Mr. MACKALL. No, I have not.

The Government exercised its third and last peremptory challenge (see Rule 24 (b), F. R.

Crim. P.) to exclude Mrs. Groce, an elevator operator at the Veterans' Administration (R. 86; see p. 6, *supra*). Mr. Neff, her replacement, was employed at the Naval Gun Factory and had been in government employment about 12½ years. He stated that he was aware of the loyalty investigation of government employees and that friendly association with Communists might be held to be cause for dismissal. He denied, however, that a verdict of not guilty would subject him to criticism in his place of employment or that his fellow-employees would "look askance" at him if he "freed a Communist." (R. 89-90.)

Petitioner exercised his third and last peremptory challenge to excuse a non-government employee (R. 91). Mr. Parham, a press-helper at the Government Printing Office, who had been in government service for 25 years, was then called and stated, in reply to questions by petitioner's counsel, that he was familiar with the government loyalty investigation and that he had no fear of any criticism if he returned a verdict of not guilty (R. 92-93). The selection of a jury was then complete.

Another juror who first replaced Mrs. Groce was excused by the court because he stated that he thought he had formed an opinion as to the guilt or innocence of petitioner (R. 86-87).

Two alternate jurors, one of whom was a government employee (R. 102), were selected but neither participated in the verdict.

In summary, seven members of the jury as finally impaneled were government employees: two (Grant and Mackall) were mail carriers and another (Jones) a post office clerk, and the remainder were a card-punch operator in the Navy Department (Grigsby), a Naval Gun Factory employee (Neff), a Commerce Department clerk (Holford), and a press-helper at the Government Printing Office (Parham). The Government used its three peremptory challenges to excuse one government employee and two in private occupations, while petitioner excused two government employees and one in a private occupation. In addition, one juror (David), a government employee, was excused for cause for belonging to an anti-Communist organization (R. 65-66; see p. 6; *supra*) and six more, at least one of whom was privately employed (R. 73), were excused for cause for having formed opinions, or prejudice, two in the process of selecting the first twelve jurors (R. 74-75, 86-87; see pp. 9, 13, *supra*), and four in selecting the two alternates (R. 97-98, 98, 99, 100).

Petitioner was convicted as charged and a motion for a new trial, based in part upon the court's denial of his challenge for cause to all government employees, was denied (R. 353, 369). He was sentenced to imprisonment for one year and fined \$1,000. The judgment of conviction was affirmed on appeal (R. 417).

SUMMARY OF ARGUMENT

The decision in *United States v. Wood*, 299 U. S. 123, established that partiality in criminal cases is not imputed as a matter of law to government employees solely by virtue of their employment; as the Court recently reiterated in *Frazier v. United States*, 335 U. S. 497, they are disqualified from jury service only if actual partiality exists. It was incumbent upon petitioner, therefore, in support of his challenge for cause, to show the existence of such special factors as required the trial court, in the exercise of a sound discretion, to find that the government employees would be partial in this case. The only special circumstance upon which petitioner relied was the program for investigating the loyalty of government workers. But there is no basis whatever for a sweeping inference that this program had caused such apprehension among government employees that they must be deemed incapable of fairness and impartiality in a case involving a Communist.

Each prospective juror, on *voir dire* examination, in response to a series of searching questions, categorically denied that the loyalty program would affect his verdict in any way. While a person's opinion of his own impartiality is, of course, not conclusive, it is certainly important evidence of his state of mind. The existence of fear which is claimed by petitioner to be so

intense as to deter government employees from any conduct seemingly favorable to a Communist, even to the point of perverting his sworn duty as a member of a jury, and to be so debilitating as to render worthless the juror's own statement that he is impartial, was not shown by any evidence or offer of proof. It certainly was not so notorious that, in the absence of proof or an offer of proof of its existence, the court should have imputed it as a matter of law. Such an implication of bias was particularly unwarranted in this case since the issues presented to the jury were so narrow that a vote for petitioner's acquittal could not reasonably be believed to invite any suspicion of disloyalty on the part of government employee jurors. Petitioner's attempt to support his challenge for cause was limited to the vague reference to the "loyalty test," and the trial court's ruling that actual bias had not been shown was a proper exercise of discretion and should not be disturbed.

ARGUMENT

PETITIONER FAILED TO ESTABLISH SUCH BIAS AGAINST HIM ON THE PART OF GOVERNMENT EMPLOYEES IN THE CIRCUMSTANCES OF THIS CASE THAT THE TRIAL COURT SHOULD HAVE EXCLUDED THEM FROM THE JURY WHICH TRIED HIM

Petitioner contends that in the circumstances of this case, involving, as it does, charges initiated by the House Committee on Un-American Activities against a Communist leader, it must be pre-

sumed as a matter of law that all government employees were biased against him, and, therefore, the presence of seven such employees on the jury which tried him constituted a deprivation of the right to an impartial jury guaranteed by the Sixth Amendment. His argument rests primarily on the hypothesis that government employees fear that if they vote for the acquittal of a prominent Communist, no matter on what charge or how flimsy the evidence, their loyalty might thereby become suspect and their jobs endangered. The trial court, in overruling the challenge for cause on the sole ground of government employment, determined that the seven government employees were actually disinterested and capable of rendering a fair and impartial verdict. The ruling, we submit, was a proper exercise of the discretion vested in the trial court in ruling on challenges of this kind.

Challenges to the polls for partiality or bias are divided into challenges for principal cause (for "implied bias") and challenges to the favor (for "actual bias"). See *United States v. Wood*, 299 U. S. 123, 135. Jurors are disqualified on challenge for principal cause if such a personal relation with one of the parties is established as in the judgment of law conclusively imports favor in behalf of that party or bias against the other. Examples of such a relationship are kinship to one of the parties or an interest in the outcome of the case. Upon the establishment of the fact that any

such factors exist, the disqualification is absolute and no evidence of the existence of actual partiality is required. Nor is any discretion permitted the trial court to determine whether the relationship would so affect a particular juror that he would be incapable of an impartial verdict.

Challenges to the favor, on the other hand, are based upon the existence of such actual bias on the part of the individual juror, in reference to the case or to either party, arising from any circumstance whatever, as satisfies the trial court, in the exercise of its sound discretion, that such juror cannot try the issues impartially and without prejudice to the substantial rights of the party challenging.

In the *Wood* case, the challenges for principal cause to three federal employees on the jury raised the question of the existence of "implied bias, a bias attributable in law to the prospective juror regardless of actual partiality. The contention of the defendant is that there must be read into the constitutional requirement an absolute disqualification in criminal cases of a person employed by the Government—a disqualification which Congress is powerless to remove or modify." 299 U. S. at 134. The Court rejected that contention and held that government employees are not subject to challenge for principal cause in criminal cases, for no such absolute disqualification existed at common law and, even if it had,

Congress had power to remove it and properly did so by the Act of August 22, 1935, c. 605, 49 Stat. 682, D. C. Code (1940) § 11-1420. This holding overruled the 1909 decision in *Crawford v. United States*, 212 U. S. 183, to the extent that it rested upon an absolute disqualification of government employees.

The *Wood* decision does not mean, of course, that government employees are immune to challenge for cause; it means simply that they cannot be challenged for bias imputed as a matter of law by virtue of their employment. Challenges to the favor, i. e., for actual bias or partiality, were unaffected by the decision, as the Court carefully explained (p. 150):

* * * We repeat, that we are not dealing with *actual bias* and, until the contrary appears, we must assume that the courts of the District, with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused. [Italics supplied.]

Since, as Chief Justice Hughes, writing for the Court, pointed out (299 U. S. at 149), "the imputation of bias simply by virtue of government employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation," the *Wood*

decision establishes that challenges, other than those traditionally regarded as being within the category of challenges for principal cause, imposed upon the trial court,⁵ in respect of each prospective juror—in this instance, each government employee—the duty “to discover whether in view of the nature and circumstances of his employment or the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him” (p. 134). See also *Frazier v. United States*, 335 U. S. 497, 510–511. In the instant case, therefore, petitioner’s challenge to all government employees required the trial court to consider all the evidence adduced or offered in respect of the impact of the loyalty program upon the mental attitude of such jurors, and to exercise a sound discretion in determining whether, in the light of these factors they could judge impartially in a case in which the accused happened to be a Communist.

Petitioner’s argument that all government employees were disqualified as “a matter of law” from serving as members of the jury which tried him, and, therefore, that evidence that there was

⁵ 28 U. S. C. (1946 ed.) 424, in effect at the time of petitioner’s trial, provides that “all challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.” This provision, with minor changes in phraseology, now appears at 28 U. S. C. 1870.

no actual bias on the part of such jurors was immaterial, ignores the distinction between challenges for principal cause and challenges to the favor. Since, as the *Wood* and *Frazier* decisions make clear, challenges simply on the basis of government employment are outside the traditional scope of challenges for principal cause, the validity of petitioner's challenge turns upon the showing made of actual partiality arising from the special "nature or circumstances of [an individual's] employment or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise." 299 U. S. at 134. The inquiry is not limited, of course, to prejudice in the conscious sense—that is, to the individual juror's belief in his own impartiality. Conceivably, a combination of extraordinary circumstances may exist whereby such a strong inference of actual, albeit unconscious, bias or predisposition may arise as to override the individual's conscious belief that he is impartial. Cf. *Frazier v. United States*, 335 U. S. at 511. But since there is no *a priori* basis for holding that government employees as a class are partial, the trial court has a discretion and duty to weigh all relevant factors in order to determine whether actual partiality exists.

An important factor was the nature of the issues in this case. Petitioner was charged with contempt of a Congressional Committee. The issues for the jury were solely and simply whether

the Committee had ordered petitioner to appear and testify and whether he had intentionally disobeyed that command. The evidence relating to those issues was undisputed. There was no controversy over what occurred when petitioner was summoned by the Committee; the only real issues were matters of law.

The trial court, aided by its experience of daily contact with jurors, has the benefit of personal observation of prospective jurors which enables it to gain an impression of their intelligence, fairness, and sense of duty. As the court so aptly stated in *Press Pub. Co. v. McDonald*, 73 Fed. 440, 442 (C. A. 2), certiorari denied, 163 U. S. 700:

Challenges in the federal courts to the favor are tried by the court * * * and an alleged error in the decision which is duly excepted to is the subject of review by the appellate court. But it must be remembered that the question before the trial judge, although one of mixed law and fact, is, in the main, a question of fact, and that, while he may be sometimes wrongly influenced by a desire to expedite the trial, or by impatience of delays, yet, if his mind is undisturbed, the impression which the juror makes of his intelligence, fairness, and evenness of mind, from a personal inspection of him, and the belief, in regard to his probable character, which is

created by his appearance under examination, his bearing and willingness to disclose the nature and extent of his preconceived opinions, are valuable, and have deserved weight before an appellate court, and therefore the finding of fact by the trial court will not be set aside except for manifest error.

The conclusion of a trial judge that ~~no~~ actual bias has been shown is entitled to great weight where, as here, extreme latitude was allowed on the *voir dire* examination to inquire fully as to the existence of bias or prejudice on the part of the seven government employees, and no conscious bias or self-interest was revealed. Each government employee stated unequivocally under oath, in response to penetrating questions, that he had no fear that a verdict in petitioner's favor would impair his standing as a loyal government worker. (R. 55, 56, 68, 76-77, 84-85, 89-90, 92-93.) The following examination of Juror Neff (R. 89-90) is typical:

Mr. McCABE. Mr. Neff, are you with the Naval Gun Factory is it?

Mr. NEFF. Yes.

Mr. McCABE. How long have you been in the Government employ?

Mr. NEFF. About 12½ years.

Mr. McCABE. Does your employment bring you into any close contact with members of the F. B. I.?

Mr. NEFF. No, sir.

Mr. McCABE. Or other Government agencies?

Mr. NEFF. No, sir.

Mr. McCABE. Members of the House Un-American Committee?

Mr. NEFF. No, sir.

Mr. McCABE. Have you followed the activities of the House Committee on Un-American Affairs?

Mr. NEFF. No, I have not.

Mr. McCABE. You are aware of the fact that a loyalty test or investigation is now going on to determine the fitness of Government employees to remain in the employ of the Government?

Mr. NEFF. Yes.

Mr. McCABE. And are you aware of the fact that friendly association with Communists might be held to be cause for dismissal?

Mr. NEFF. Yes, sir.

Mr. McCABE. Knowing that, do you feel, when you came to the consideration of the case, in which, as here, a high official of the Communist Party is the defendant, that the finding of a verdict of not guilty, if you conscientiously arrived at such a verdict, that verdict would subject you to criticism in your place of employment?

Mr. NEFF. No, sir.

Mr. McCABE. You do not think that your fellow employees would look askance at you because you had freed a Communist?

Mr. NEFF. No, sir.

Mr. McCABE. Or members of the House Un-American Committee had appeared and testified against him?

Mr. NEFF. No, sir.

Mr. McCABE. It would not have any effect on you at all?

Mr. NEFF. No, sir.

Granted that one's opinion of his own impartiality is not conclusive, still the statements under oath by persons who presumably had no interest in serving and readily could have expressed a preference to be excused, are at least primary evidence of their disinterest and impartiality. They are competent and relevant and are entitled to great weight. "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself." *People v. Reyes*, 5 Cal. 347, 349, quoted with approval in *Aldredge v. United States*, 283 U. S. 308, 313, n. 3. And it should be noted in this connection that six prospective jurors did in fact indicate prejudice arising from newspaper accounts and other sources, and they were excused (*supra*, p. 14).

Petitioner contends that government employees are incapable of objectivity and cannot truthfully say whether they have the proper mental attitude of disinterest and, therefore, despite their avowals to the contrary, bias must be conclusively imputed. Individuals with little or no recognition of their subconscious motivations may indeed

find it difficult correctly to appraise their bent of mind. For deep below consciousness are the attractions and repulsions, the desires and fears, the likes and dislikes—in short the complex of forces which make the man. Cf. Cardozo, *Nature of the Judicial Process*, pp. 167-177. And, human limitations being as they are, perhaps complete objectivity—the subjugation of all prejudices, desires, fears, emotions in general—may be as unattainable among jurors as among other members of our society. But, as Chief Justice Hughes admonished in the *Wood* case (299 U. S. at 150), “While bias, as has been said, is an ‘elusive condition of the mind,’ that consideration affords no ground for extreme and fanciful tests.” Our system of administering criminal justice, imperfect though it may be in theory, requires for its practical operation some demonstrable reason—more than mere hypothesis or conjecture—for branding a large segment of the population as incapable of a dispassionate judgment.

If, as petitioner urges, the jurors’ opinions of their state of mind are to be discounted completely, it must be upon the basis that there were prejudice-causing factors of so overwhelming a nature that conscious belief was rendered worthless. He contends, in effect, that the jurors were afraid even to admit that they feared the results of a vote of acquittal because a statement that

such fear existed would itself be damaging to their interests. But the fact that four government employees,* Raybould, Richardson, Scott and Rensberger, who were summoned to act as jurors, admitted actual bias and were excused by the trial judge (R. 97-98, 98, 99, 100) strongly suggests the opposite. In any event, no such charge was made in the trial court and no offer was made to produce any evidence in support of the challenge: no evidence, for example, of efforts by superior officials or members of Congress to intimidate them in any way; no evidence, based on surveys, polls, observations of reporters, or otherwise, of the reactions, either of particular government employees or the group as a whole, to the loyalty program; and no expert opinion as to the effect of the program upon their mental attitudes. In short, no support whatever of the challenge for cause was tendered except the mere statement of petitioner's counsel: "I think the reasons are clear to us all without argument, Your Honor * * * this loyalty test does bring a new shade into the

*The occupation of these four jurors is shown by the list of prospective jurors from which the jury was selected. This list is reprinted as the Appendix to this brief, *infra*, pp. 32-33.

An affidavit which had been filed by one of petitioner's attorneys in support of a motion for change of venue contained assertions by three newspaper columnists to the effect that government employees were afraid to purchase literature, or attend meetings, that might be termed "radical" (R. 27-32). But no attempt was made to offer even these opinions in support of the challenge for cause.

case. It is for that reason that I was urging that at this time" (R. 64-65). The loyalty order (Executive Order 9835, issued March 21, 1947, 12 Fed. Reg. 1935) could be and presumably was judicially noticed, of course. But no attempt was made by petitioner to bridge the crucial gap between the terms of the order and the alleged creation of such intimidation and fear on the part of those persons subject to the order that they should be deemed incapable of rendering a fair verdict. Instead, this Court is now asked to hold as a matter of law that all government employees are so intimidated by fear of the consequences of any action seemingly favorable to a Communist that they are incapable of answering truthfully on *voir dire* or of discharging their sworn duty as jurors to base their verdict solely on the evidence and the instructions of law.* To ask this Court to find that such matters are "actually so notorious to all" (see Wigmore, *Evidence*, § 2571) as to warrant the invocation of the principle of judicial

* The jury was carefully instructed by the court (R. 333):

"* * * Bear in mind that you are a fact-finding body and it is your duty to determine the facts uninfluenced by passion or prejudice or any other emotion.

"Now, the fact that the defendant is a Communist should not prejudice you for or against him. He is entitled to the same calm, fair, impartial trial as any other person, irrespective of his political or economic beliefs or philosophic views. Neither is he on trial for being a Communist. * * *

notice, is to exceed the limits of reality. This is particularly true in this case because the narrow issues for the jury's determination were of such a nature that a vote for acquittal could not reasonably support any imputation of disloyalty on the part of the government employee jurors.

Petitioner had the burden of tendering proof in support of his charge of partiality. Cf. *Frazier v. United States*, 335 U. S. at 503; *Glasser v. United States*, 315 U. S. 60, 87. Not only did he fail to support his challenge, unless the vague reference to the "loyalty test" may be so construed, but his affirmative attempts to elicit from the seven government employees some acknowledgment of partiality met with sworn categorical denials. Under those circumstances, the trial court's determination that cause for challenge had not been demonstrated was manifestly correct.

A great deal must, of necessity, be left to the trial court's sound discretion in appraising the credibility and fairness of prospective jurors. In the absence, as here, of a clear abuse of that discretion in overruling the challenges for cause, this Court should not disturb the finding that despite their government employment the jurors could act impartially. Cf. *Reynolds v. United States*, 98 U. S. 145, 156; *Spies v. Illinois*, 123 U. S. 131, 179; *Connors v. United States*, 158

U. S. 408, 413. As Mr. Justice Holmes observed in *Holt v. United States*, 218 U. S. 245, 249:

* * * The finding of the trial court upon the strength of the jurymen's opinions and his partiality or impartiality ought not to be set aside by a reviewing court unless the error is manifest, which is far from being in this case.

And, as the Court stated in the *Wood* case (p. 150-151):

* * * the spectacle of the exclusion *en masse* from * * * [jury service] of citizens otherwise highly desirable in point of intelligence and character—solely by reason of their employment by the Government—and the imposition in consequence of a heavier burden upon other citizens * * * would constitute a serious reproach to the competency and efficiency of the administration of the system of jury trials.

Finally, as Mr. Justice Murphy pointed out in *Thiel v. Southern Pacific Co.*, 328 U. S. 217, 220:

* * * Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. *Jury competence is an individual rather than a group or class matter.* That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the demo-

cratic ideals of trial by jury. [Italics supplied.]

For the trial court on this record to have excluded all government employees would have given countenance to the charge, in support of which no evidence was offered, that fear of being investigated is so deep-seated that they are incapable of sufficient objectivity to be fair to a Communist on trial. The trial court refused to hold—properly so, we submit—that any impairment of their normal fortitude and independence had been so demonstrated as to require their absolute disqualification in cases of this type.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment below should be affirmed.

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ALEXANDER M. CAMPBELL,

Assistant Attorney General.

ROBERT S. ERDAHL,

HAROLD D. COHEN,

Attorneys.

NOVEMBER 1949.

APPENDIX

JURORS CRIMINAL COURT NO. TWO—JUNE 1947

	Age	Address
1. Aristide L. Borelli (Govt.)...	54	618 G St. NE. Stone Mason—F. W. A.
2. Paul B. Burke	40	1915 R St. SE. Litho.—Wash. Planograph Co.
3. Mrs. Annie Johnson Darby..	30	1204 V St. NW. Housewife
4. Andrew M. David (Govt.)...	43	113 C St. SE. Mechanic—F. W. A.
5. Clinton M. Evans	29	211 Elm St. NW., Rm. 200 Cook—Hollywood Grill
6. Mrs. Nancy Pennington Fur- low (Govt.).	51	550 Peabody St. NW. Class. Clk. Bureau Census
7. Mrs. Elizabeth Morton Ging- rich.	24	1931 Biltmore St. NW. Housewife
8. Stanley D. Grant (Govt.)...	53	123 Adams St. NW. Letter Carrier—P. O.
9. Mrs. Amanda E. Grigsby (Govt.).	46	720 Park Rd. NW. Card Punch Opr. Navy Dept.
10. Mrs. Bessie M. Groce (Govt.)	47	208 F St. SW. Vet. Admn. Elev. Cond.
11. Leroy Harris	60	231 Oglethorpe St. NW. Mgr. Auto Parts, Wellborn Motors
12. Arthur Hirsh	46	7440 Georgia Ave. NW. #105 Partner Plumbing Supply
13. Mrs. Elizabeth Levine Hol- ford (Govt.).	35	1314 Mass. Ave. NW. #204 Comm. Dept. Stat. & Clerk
14. William O. Howard	39	1613 F St. NE. #4 Street Car Operator
15. Mrs. Margaret T. Iglehart..	61	814 11th St. NE. Marvin Credit—Addresso.
16. Frank E. Jones (Govt.).....	54	1836 Swann St. NW. P. O. Clerk
17. James L. Lineberger	48	942 O St. NW. Self-Hauling & Moving
18. Harold W. Mackall (Govt.)..	44	841 Howard Rd. SE. P. O. Letter Carrier
19. Jacob Mehlman	52	2734 Woodley Rd. NW. Part owner Liquor Store
20. Fred E. Neff (Govt.)	41	1317 44th Pl. SE. Machinist—Naval Gun Fact.

	Age	Address
21. Percy Parham (Govt.)	42	2213 N St. NW. #2 G. P. O.
22. Milton M. Perlman	45	301 Hamilton St. NW. #8 Partner—Wholesale Gen. Merch.
23. Garvin E. Peterson	45	4607 Conn. Ave. NW. #621 Sismn. Steam Shovel in Phila. & Harrisburg
24. Merrill E. Raybould (Govt.)	35	128 C St. NE. #33 G. P. O. Foreign Reader
25. Marion C. Rensberger (Govt.)	32	1741 Trinidad Ave. NE. #10 G. A. O. Prop. & Supp. Clk.
26. William W. Richardson (Govt.)	49	3600 20th St. NE. G. A. O. Auditor
27. Miss Arabella J. Scott (Govt.)	36	1330 L St. NW. Secy. Tariff Commission
28. John M. Scott (Govt.)	60	1515 Swann St. NW. Treas. Dept. Mimeographic
29. Lloyd J. Streifuss	35	4019 Foote St. NE. Capital Airlines
30. Miss Beulah E. Wolfe (Govt.)	46	2150 Pa. Ave. NW. #310 F. B. I.—Teacher

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IN THE
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OCTOBER TERM, ~~1948~~ '49

No. ~~498~~ 14

EUGENE DENNIS, *Petitioner,*

v.

UNITED STATES OF AMERICA.

**BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS
CURIAE IN PROCEEDINGS FOR WRIT OF
CERTIORARI.**

NATIONAL LAWYERS GUILD,
ROBERT J. SILBERSTEIN,
Executive Secretary.

ARTHUR G. SILVERMAN,
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Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1948.

No. 436.

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UNITED STATES OF AMERICA.

**BRIEF OF NATIONAL LAWYERS GUILD AS AMICUS
CURIAE IN PROCEEDINGS FOR WRIT OF
CERTIORARI**

STATEMENT.

The National Lawyers Guild is a bar association with a nation-wide membership. It is pledged, among other objects, "to protect and foster our democratic institutions and the civil rights and liberties of all the people."

The particular concern of this association with the questions presented by this petition are amply stated in our prior briefs *amicus curiae* in this court upon other petitions for certiorari to review convictions for contempt of the Committee on Un-American Activities involving some of the questions presented here. The National Lawyers Guild

believes that the denial of certiorari in this case would leave unreviewed a decision which makes a vital departure from the constitutional principles established by this Court, and would destroy protection heretofore afforded to our basic democratic institutions and the civil rights and liberties of all the people. For these reasons it has secured the consent of the parties to the filing of ~~this~~ brief as *amicus curiae*.

To avoid repetition we respectfully refer this Court to the arguments made and authorities cited in our briefs in support of the petition for certiorari in *Barsky et al. v. U. S.*, October Term, 1947, No. 766, the petition for rehearing in the same case, and *Josephson v. U. S.*, October Term, 1947, No. 535. These set forth and treat the constitutional and other legal grounds upon which we again urge here the inherent invalidity of the statute and resolution creating this Committee and the gross violations of constitutional right established and confirmed by the Committee's operations over the decade or more that it and its predecessor Committees have existed.

In particular relation to the Committee's operations, we refer to the argument made at pages 6-15 of the brief *amicus curiae* filed with this Court in the case of *Barsky v. U. S.* on behalf of the International Longshoremen's and Warehousemen's Union, and certain other international unions, wherein the writer appears as Counsel. In this connection, we contend that several offers of proof in this record relating to particular abuses practiced by this Committee, were excluded by the trial court contrary to the authority of *Thornhill v. Alabama*, 310 U. S. 88, 98, and *Yick Wo v. Hopkins*, 118 U. S. 356, 373-374.

These offers included the Committee's compilation of a blacklist of hundreds of thousands of persons whose activities were not unlawful but whose views it disapproved, all for the calculated purpose of stigmatizing and depriving these persons of their livelihoods (J. A. 186-189); the Committee's public branding of the Southern Conference

for Human Welfare as disloyal without hearing of any kind (J. A. 190-191);* the Committee's imposition of a condition upon this petitioner's right to testify which it had studiously withheld from other witnesses (J. A. 199-200); the Committees' branding as disloyal a long list of prominent Americans, many of them in high public office (J. A. 214-215); the constant singling out of groups and individuals for "investigation" solely on the basis of the personal disapproval of their views by individual committee members (J. A. 274-275, 278, 281-283).

These offers should have been received under a rule of proper latitude. Their exclusion was reversible error. *Thornhill* and *Yick Wo* cases *supra*. The actual practices of the Committee are perhaps the best evidence of the validity or invalidity of the reasons advanced in support of the statute, challenged in the instant case as violating the guarantees of the First Amendment.

In this brief we shall confine ourselves to the presentation of additional matters which in our view demonstrate clearly the urgent necessity of a determination by this Court of the constitutional issues presented by this case.

* This particular episode is the subject of an incisive analysis by Professor Gellhorn, "*Report on a Report, etc.—Harvard Law Review*," Vol. LX-No. 8-P 1193, which we believe pointedly confirms the soundness of our entire argument based on the committee's manner of operation.

ARGUMENT.

Recent Activities of the Committee and the Mounting Public Concern Which They Evoked Compel the Conclusion that this Court Should Now Determine the Constitutional Validity of the Statute and Resolution Establishing the Committee and Its Proceedings Thereunder.

The vague and indefinite character of the statute and resolution creating the Committee has inevitably left it without any real limitation whatever upon its power. Recently it has gone even further afield than theretofore. Not content with ranging its weapons of intimidation and injustice over the total field of opinion and association, it has undertake to supplant, or interfere with, the functions of the Department of Justice in the field of espionage. The Committee's new rampage of publicity-seeking has unquestionably increased the growing awareness of its threat to civil rights, due process, and the very democratic structure of our system of administering justice.

This increased awareness was perhaps most dramatically registered by President Truman's flat declaration last August that the Committee's so-called espionage inquiry violated the Bill of Rights. *Washington Evening Star*, August 19, 1948, p. 1. No less sharp was the Attorney General's own statement that followed, condemning the same inquiry as "an attempted encroachment upon the independent integrity of a coordinate branch of government" and "contrary to our democratic system." *Department of Justice Release*, September 29, 1948. This latter condemnation was pointedly justified when, during the Grand Jury's espionage inquiry in the Southern District of New York, the Committee undertook to call Grand Jury witnesses to a public hearing in a parallel inquiry of its own. The result was an open and unseemly conflict with the Department of Justice.

These events eliciting, as they have, such sharply worded charges of encroachment from the highest executive authority, point unmistakably to the public need for a final determination by this court of the Committee's entire scope and authority, including the validity of its very establishment, the more so since a Committee spokesman has not hesitated to call it the "Grand Jury" of America. *91 Cong. Rec. 275.*

It is time, we believe, that the salutary limitation upon the power of congressional inquiry defined in *Kilbourn v. Thompson*, 103 U. S. 168 (1881), be again reaffirmed and applied to this Committee's performances and pretensions with all the clarity and rigor required for effective protection of the basic rights involved. Cf. *United States v. Lee*, 106 U. S. 196, 220 (1882); *McGrain v. Daugherty*, 273 U. S. 135, 176 (1926); *Jurney v. McCracken*, 294 U. S. 125, 134 (1934); *Jones v. S. E. C.*, 298 U. S. 1, 25-26 (1935).

There are still other expressions of public awareness and protest which are highly persuasive of the same need. The President's Committee on Civil Rights has pointed to the public excitement over "communism" that this Committee has done so much to stimulate, as having engendered "a state of near hysteria" which "threatens to inhibit the freedom of genuine democrats". *To Secure These Rights*, p. 49. The House of Bishops of the Protestant Episcopal Church in the United States has declared in a unanimous resolution against the same hysteria "An inquisitorial investigation of men's personal beliefs is a threat to freedom of conscience . . . " *New York Herald Tribune*, Nov. 8, 1947, p. 8. Mrs. Eleanor Roosevelt had added her own warning—"The Un-American Activities Committee seems to me to be better for a police state than for the U. S. A." *Washington Daily News*, October 29, 1947.

It has been recognized that condemnation of this Committee and its practices had come from all sections of the population. ". . . no other committee of Congress . . . has ever engendered such widespread or bitter condemna-

tion from varied leaders of American thought." *Alan Barth, Washington Post*, May 30, 1948, p. 2-B. Dr. August Raymond Ogden in a noted study of this Committee, published in 1945, said— "... it stands in the history of the House of Representatives as an example of what an investigating committee should not do." *Alan Barth, id.*

Similarly persuasive is the condemnation equally severe from influential circles abroad. According to an Associated Press dispatch from London—"Newspapers of the left, center and right alike used such terms as 'Hollywood witch hunt', 'nauseating spectacle' " to describe the Committee's notorious Hollywood hearings. *P. M.*, October 27, 1947, p. 3; cf. *Lawson v. U. S.*, 93 L. Ed. 42, Nov. 8, 1948. The *London Observer* in an editorial on the same subject entitled "Star Chamber" said—"Why then should Americans in the film industry not enjoy that freedom of thought guaranteed by the constitution? ... it would be a poor bargain to keep the atom secrets and lose those freedoms which are the secret of America's greatness." October 26, 1947, p. 4. In Australia too, a well known commentator wrote of the same investigation—"I have no time for communism but consider this investigation is a witch hunt, a Donnybrook Fair, and a high pressure farce." *Don Iddon's Diary, Sunday Mail, Brisbane, November 2, 1947.*

These comments from abroad possess a special force in view of our government's adherence to the Declaration of Human Rights recently adopted by the United Nations General Assembly in Paris of which Articles 17 and 18 of the draft unanimously adopted by the Human Rights Commission are substantially an enactment of our own Bill of Rights—"Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." (Art. 17) and "Everyone has the right to freedom of assembly and association." (Art. 18)

We believe it is impossible to reconcile the authority claimed for this Committee with the democratic leadership

in world affairs which our championship of this Declaration is supposed to signalize. In our view the conclusions of Judge Clark in *Josephson v. U. S.*, 165 F. 2d 93, and of Justice Edgerton in *Barsky v. U. S.*, 167 F. 2d 241, on the invalidity of this Committee's entire authority, are the only ones consonant with the mandate of the Bill of Rights. Their essential soundness has been persuasively confirmed by the reactions of official and other influential circles here and abroad to the Committee activities which have recently climaxed an entire decade of abuses. Thus, it seems that public acceptance of the validity of the dissents of Judge Clark and Justice Edgerton have preceded their acceptance by the highest Court as was the case with the historic "Civil Rights" dissents of Justices Holmes and Brandeis in the 1920's.

We acknowledge, of course, that this Court may have already reached the conclusion that the views embodied in the dissents of Judge Clark and Justice Edgerton, which we support here, require immediate consideration in connection with a full hearing on the merits, since it has granted unlimited certiorari in *Eisler v. U. S.*, October Term, 1948, No. 255. If so, this case raises, among other issues, the same constitutional issue as the *Eisler* case touching the establishment and powers of the Committee, and the petitioner should be afforded an opportunity to argue these issues in his own case.

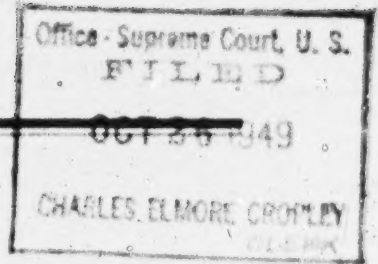
We earnestly urge the Court to grant this petition for certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 14.

EUGENE DENNIS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

**BRIEF OF THE NATIONAL LAWYERS GUILD
AS AMICUS CURIAE.**

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**BRIEF OF THE NATIONAL LAWYERS GUILD
AS AMICUS CURIAE.**

Statement.

The National Lawyers Guild is a national association of members of the bar, having chapters throughout the United States. As a bar association, this organization has, at all times, been intimately concerned with the proper and fair administration of justice in courts throughout the land. As an association of lawyers, whose belief it is that attorneys bear a special responsibility to the people in the protection of their civil rights and liberties, the Guild has frequently participated in proceedings involving the serious constitutional questions which delimit the scope and area of the freedom guaranteed to the people by the Bill of Rights.

The single issue before the Court in this proceeding engages the attention of the Guild in both of these respects. It has, accordingly, secured the consents of the parties herein to the filing of this brief as amicus curiae.

The narrow question presented is whether government employees as a class, must, today, in the light of the special pressures which operate upon them, be excluded from a jury panel which must determine the guilt or innocence of a leader of the Communist Party of the United States of a charge initiated by the Government to vindicate its authority.

The effect of the determination of this question, however, will not rest here. The stake is not so small as one year in the life of this appellant. The lives and reputations of many persons, caught in the post-war whirlpool of fear and hysteria, hang on the decision of this Court. The survival of the jury in its historic function as the shield of the people against oppressive sovereigns, will also be decided here. The vindication of the hard-bought guarantee of the Sixth Amendment is at issue, as is the stature of the Courts of this country as the dispensers of even-handed justice, born of Constitutional prerogative, and bred on the American sense of fair play.

Fidelity to its responsibility and trust animates the appearance of the Guild as *amicus curiae*; its brief is submitted in this spirit and in the expectation that its views may aid the Court in reaching a proper determination, consonant with the best traditions of American democracy.

Argument.

The institution of the Jury "as the bulwark of the People against the tyrannical or unlawful exercise of authority" (Sir Richard Phillips, *Powers and Duties of Juries*, preface IV; Forsythe, *History of Trial by Jury* (2nd. ed.) 363), has long been recognized in Anglo-American jurisprudence, and highly esteemed and valued by the people as an agency for securing their freedoms. Blackstone, *Commentaries*, III, 350; May, *Constitutional History of England*, II, 114; Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 Harvard Law. Rev. 917.

Abrogation, in whole or in part, of the right to trial by an impartial jury of one's peers has been the seemingly inevitable accompaniment of the assumption, in every age, of autocratic power by rulers and governments. Tudor England resorted to the Court of Star Chamber. Its ultimate abolition was achieved on the ground that the "decrees of the Court have by experience been found to be an intolerable burden to the subjects, and the means to introduce an arbitrary power and government." 16 Chas. I, C. 10. In the Declaration of Independence, the colonists "submitted to a candid world" that a despotic king had deprived them of "the benefits of Trial by Jury." See also, Elliot's *Debates*, IV, 143. As a prelude to the sedition trial of James Callender, indicted under the ill-famed Alien and Sedition Laws of 1798, Supreme Court Justice Chase, riding the circuit, instructed the Marshall at Richmond, Virginia, "not to put any of those creatures called democrats on the jury."

In the midst of the bitter social conflicts of this day in American history, marked by severe political repression, the question of an impartial jury trial is again raised, in the classic historical setting of the struggle of the politically pilloried and persecuted against their persecutors and oppressors.

The standards by which the issue, today, must be determined are fixed in a matrix compounded of Constitutional Injunction and unbroken judicial precedent. The Sixth Amendment, which along with the other guarantees of the Bill of Rights, was extracted by a revolutionary people jealous of its freedom, provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." Court decisions, dating from the foundation of the Republic to the present day, reflect not only the letter of the Amendment, but the spirit of the American tradition of trial by an impartial jury drawn from a cross-section of the com-

munity. 1. *Burr's Trial* 464; *Glasser v. United States*, 315 U. S. 60; *Chambers v. Florida*, 309 U. S. 227, 336.

Even a suspicion of partiality or prejudice will disqualify a prospective juror from sitting on a panel. 1 *Burr's Trial* 464; *United States v. Chapman*, 158 F. (2d) 417 (C. C. A. 10th, 1946), *Cert. den.* 335 U. S. 860. In the latter case the Court commented (p. 460): "Only by a punctilious regard for a suspicion of prejudice can we hope to maintain the highest traditions of our jury system."

From the time the jury system reached its maturity in England, it has been recognized that certain relationships between parties and prospective jurors *per se* create a "suspicion of partiality." It was considered necessary that the triers of fact be "free and lawful, impartial and disinterested, neither the enemies nor the too close friends of either litigant." (Pollock and Maitland, *History of English Law*, II, 619). Lord Coke listed as the third of his four principal challenges to the polls, "*propter defectum*, for affection and partiality." (Coke, *on Littleton*, I, 156 (b)). Bacon considered good cause for principal challenge "if the juror be under the power of either party, as if counsel, servant of the robes, or tenant. (Bacon's *Abridgment*, III, 756). Bentham sought to protect jurors from influences which are "liable to be exercised by, or to emanate from individuals or classes of men, in the character whether the parties or of persons having in any way an interest in the event of each respective cause." (Bentham, *The Elements of the Art of Packing*, Lord, (1821) 219). See also: *Elliot's Debates*, III, 542.

From this basic concept have developed rules of law which impute bias to classes of individuals without regard to whether or not an individual of that class is, in fact, biased or prejudiced, and membership in that class is, *per se*, held basis for disqualification. *Republic v. Richards*, 2 U. S. 224; *Miller v. United States*, 38 App. D. C. 361; *Young v. Marine Insurance Co.*, Fed. Cas. No. 18,163, 1 D. C. 452; *Anderson v. Todd*, 63 F. Supp. 229.

Under certain circumstances, government employees, although not under an absolute disqualification as such, may be excluded as a class. *United States v. Woods*, 299 U. S. 123. The *Woods* case affirmed the constitutionality of a statute removing the absolute disqualification upon civil servants to sit as jurors in criminal prosecutions, created by the decision in *Crawford v. United States*, 212 U. S. 183. It, however, writes into the law a recognition that in special situations, the relationship of government employed jurors to the prosecution may give rise to, at the very least, a suspicion of bias or partiality which must disqualify them as a class. The Court there said at p. 150:

"It is suggested that an employee of the Government may be apprehensive of the termination of his employment in case he decides in favor of the accused in a criminal case. *Unless the suggestion be taken to have reference to some special and exceptional case it seems to us far-fetched and chimerical.*" (Italics added.)

Such "exceptional cases", leave in force the rationale of the Court, in the *Crawford* case, as the standard for determining the impartiality of a government-employed juror:

"It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict."

In *Frazier v. United States*, 355 U. S. 497, the majority reiterated this view that actual bias in relation to government-employed jurors includes "not only prejudice in the subjective sense but also such as might be thought implicitly to arise 'in view of the nature or circumstances of his employment, or of the relation of the particular govern-

mental activity to the matters involved in the prosecution or otherwise.'"

It is submitted that such exceptional circumstances exist here as to bring into operation the exclusionary tests of the *Woods*, *Crawford* and *Frazier* cases.

This case was brought against a leading member of the Communist Party of the United States by the Government of the United States, on the information of the House Committee on Un-American Activities, an organ of the House of Representatives of the United States, on a charge of contempt of that body. The jurors were impanelled and sat in the District of Columbia, in an atmosphere created by years of concentrated effort to create the impression that the Communist Party was "subversive", and "Un-American"; that adherents to its ideas were similarly "subversive" and "Un-American"; that anything in the nature of sympathetic audience to its views, or what were ascribed as its views were, equally, not to be tolerated by "patriotic" Americans. (Cushman, R. E., *Safeguarding Civil Liberty Today*, N.Y. 1945.) The leading spirit of this effort had, for a decade, been the House Committee on Un-American Activities.

In addition to the psychological pressures to compel conformity to the "orthodox", the Committee, at all times, exercised the power and prestige of government to coerce adherence to its views. The means adopted by it have ranged from exposure to public obloquy (*see e. g.* H. R. Rep. No. 1, 77th Cong., 1st Sess. (1941) 23, 24) to Bills of Attainder (*see*, *United States v. Lovett*, 328 U. S. 303). One of its prime efforts was to embody its entire program of political repression into law. (*see*, Mundt-Nixon Bill, H. R. 1844, 80th Cong., 2d Sess.)

The effect of the activities of this infamous Committee has resulted in "A state of near-hysteria (which) now threatens to inhibit the freedom of genuine democrats." (Report, President's Committee on Civil Rights: "To Secure these Rights", 1947, 49; Lerner, M., "Freedom:

Imagine and Reality", Safeguarding Civil Liberties Today, 1945; Clark, J., dissenting in *United States v. Josephson*, 165 F. (2d) 82, 100 (C. C. A. 2nd 1947), cert. den. 68 S. Ct. 609; Edgerton, J., dissenting in *Barsky v. United States*, 167 F. (2) 241 (App. D. C., 1947) cert. den. 68 S. Ct. 155, *pet. for rehearing pending*.

Executive Order 9835 (12 Fed. Reg. 1947) applied the policies of this Committee specifically to government employees. For, among other things, "sympathetic association with any . . . communist", under this so-called "loyalty" program, a government employee might be discharged from his job, and stigmatized as "disloyal" to the government of the United States. The character of the investigation, the amorphousness of the criteria for judging "sympathetic association" or "disloyalty" must compel government employees to avoid even the appearance or suspicion of such activity. 58 Yale Law Journal 1; Physics Today, Vol. 2, No. 3 (1949); O'Brian, "Loyalty Tests and Guilt by Association," 61 Harvard Law Rev. 592. Case after case of dismissal and "voluntary" resignation has brought this fact home to each government employee. (See e. g. P. M. April 19, 1948, 7; the case of Dr. Edward U. Condon; Herald Tribune, Dec. 21, 25, 1948; the case of Laurence Duggan; P.M., August 18, 1948; the case of Harry Dexter White; Andrews, Washington Witch Hunt, N.Y. 1948, 1-77; the case of the seven State Department employees.)

It would not be without reason, therefore, if a government employee should be swayed by considerations of self-interest, conscious or subconscious, in the reaching of a verdict concerning a leader of the Communist party, when faced with the possibility of such a charge of "sympathetic association". See, Edgerton, J. dissenting in *Eisler v. United States*, decided April 18, 1949, :

"Government employment alone does not disqualify a juror in a prosecution for larceny, *United States v. Wood*, 299 U. S. 123, or violation of the narcotics laws.

Frazier v. United States, 355 U. S. 497. But government employment is not commonly known to be endangered by sympathetic association with thieves or drug peddlers. It is commonly known to be endangered by sympathetic association with Communists. Government employees are therefore anxious, in various degrees, according to their temper and circumstances, to avoid seeming to sympathize with Communists. Acquittal sometimes indicates, and is often thought to indicate, that the jury sympathized with the accused. It is therefore prudent for government employees to convict an alleged Communist and imprudent to acquit him. For government employees to acquit this alleged Communist leader would have been particularly imprudent."

Judge Edgerton's conclusion as to the law of that case, under the law and the facts of the instant case would seem to be the proper guide for the decision of the subject action. "Trial by jurors whose personal security will either actually or apparently be promoted by conviction and endangered by acquittal is not 'trial by an impartial jury' and is not due process of law."

The petitioners challenge to government employees in this proceeding should have been sustained.

Conclusion.

THE NATIONAL LAWYERS GUILD submits that this Court should reverse the judgment of conviction.

Respectfully submitted,

~~NATIONAL LAWYERS GUILD,~~

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.  14

14

EUGENE DENNIS,

Petitioner,

against

UNITED STATES OF AMERICA.

On Petition for Rehearing

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

O. JOHN ROUGE,
BENEDICT WOLF,
Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1949

No. 19

EUGENE DENNIS,

Petitioner,

against

UNITED STATES OF AMERICA.

On Petition for Rehearing

**MOTION FOR LEAVE TO FILE BRIEF
AS AMICI CURIAE**

*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of the
United States:*

The undersigned, petitioners in *Barsky, et al. v. United States* wherein petition for rehearing from a denial of petition for writ of certiorari to the Court of Appeals for the District of Columbia is presently pending before this Court,* and respondents in *United States v. Fleischman*** and *United States v. Bryan**** which were argued before this Court on December 15, 1949, and have not to date been decided, respectfully request this Court for leave to file a brief as *amici curiae* in this case.

* October Term 1947, No. 766.

** October Term 1949, No. 98.

*** October Term 1949, No. 99.

Motion for Leave to File Brief as *Amici Curiae*

The interest of the movants in the petition for rehearing by Dennis is two-fold: each of the cases ultimately involves the constitutionality of the Congressional authorization for the House Committee on Un-American Activities; and in *Bryan* and *Fleischman*, as in *Dennis*, the question is raised as to the propriety of the presence of Government employees as jurors in prosecutions for contempt of the House Committee.*

The consent of the respondent in this case to the filing of a brief as *amici curiae* by the movants herein has been sought but not obtained, consequently the instant motion is made pursuant to paragraph 9(c) of Rule 27 of this Court.

I

The petition for rehearing herein did not raise the question of the constitutionality of the Congressional enactment pursuant to which the House Committee conducted and continues to conduct its investigations. If the instant motion is granted, the movants will present reasons why this Court should hear and pass upon that constitutional issue. To date the Court has refused to grant certiorari on the question of the constitutionality of the House Committee.** In the instant case the Court has not only denied certiorari on the question of the validity of the House

* Even in the event this Court should affirm the decision by the Court of Appeals in the District of Columbia in *Bryan* (174 F. 2d 519) and *Fleischman* (174 F. 2d 525) without reaching the question raised as to the presence of Government employees on the jury, respondents in those cases are vitally affected by the decision of this Court in *Dennis* in that upon a new trial they will be confronted with the question of the inclusion of Government employees as jurors.

** *Josephson v. United States*, 333 U. S. 838; *Barsky v. United States*, 334 U. S. 843; *Dennis v. United States*, 337 U. S. 954; *Marshall v. United States*, 18 L. W. 3040; *Lawson v. United States*, *Trumbo v. United States*, 18 L. W. 3082; *Morford v. United States*, 18 L. W. 4235.

Committee but, in addition, it has affirmed a judgment of conviction which is ultimately predicated upon the power of the House Committee to compel testimony. Consequently, although this Court has frequently reiterated the admonition that the denial of a petition for writ of certiorari is not a determination on the merits (*Maryland v. Baltimore Radio Show*, 338 U. S. 912, 919; *House v. Mayo*, 324 U. S. 42; *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401; *United States v. Carver*, 260 U. S. 482; see also, *Darr v. Burford*, 18 L. W. 4217, 4221), the affirmance of the judgment of conviction for the commission of an alleged contempt before the House Committee does tend to convince the Bench and the Bar—as the public has already been convinced—that this Court deems the House Committee to be constitutional. It is the contention of the movants that thus to adjudicate one of the most important and basic issues of civil liberties in our times is inconsistent with the obligation of this Court to state cogently the reasons for its decisions. Only by such statement can this Court discharge its responsibilities to the public and to the legal profession. Nor should adjudication on the constitutionality of the House Committee be further adjourned on the grounds that “the question had better await the perspective of time or that time would soon bury the question” (FRANKFURTER, J., dissenting in *Darr v. Burford*, *supra*, at 4224), for the persistence of the excesses by the House Committee and other Congressional investigating committees and the political hysteria generated by the Committee gain momentum, not quiescence, from the silence of this Court. Written opinions are essential not only as an effective check upon the judiciary but also as a guide to the parties to the litigation, to the lower tribunals, and to the political processes which when advice is given by the highest tribunal as to the constitutional scope of Congressional investigations, may then be used in an enlightened fashion to alleviate the conditions created by the House Committee and other similar agencies. If the instant motion is granted the movants

will argue to the Court the historical and pragmatic reasons why it should reduce its views on the constitutionality of the House Committee to an opinion, and movants will further indicate that although the writ of certiorari herein was limited to the question of the propriety of permitting Government employees to sit on the jury, this Court may nevertheless in the interests of justice rule upon the constitutional issues (see, e.g., *Terminiello v. City of Chicago*, 337 U. S. 1; see also *Fischer v. United States*, 328 U. S. 463, 467; *Brashfield v. United States*, 272 U. S. 448, 450; *Weems v. United States*, 217 U. S. 349, 362; *Crawford v. United States*, 212 U. S. 183, 194; *Wiborg v. United States*, 163 U. S. 632, 638).

II

In the event that the instant motion should be granted, the movants would argue that the grounds for concurrence assigned by Mr. Justice REED impose a burden of proof incapable of fulfillment.

Three members of the Court joined in the majority opinion in this case. Mr. Justice JACKSON concurred indicating, however, that he would vote for the exclusion of Government employees as a class from the jury in all prosecutions for contempt of the House Committee whenever a majority of the Court reaches agreement with him on that proposition. Mr. Justice BLACK and Mr. Justice FRANKFURTER dissented and would reverse the conviction. Mr. Justice DOUGLAS has recently indicated that he dissents from the majority view of the Court in this case (see *Morford v. United States*, 18 U. S. Law Week 4325). Mr. Justice CLARK did not sit in the instant case. Consequently, in the pending prosecutions for contempt of the House Committee on Un-American Activities which may hereafter come before this Court, and in which Mr. Justice CLARK

will probably not participate, this Court is evenly divided on principle as to the applicable rule of law.* In the circumstances it becomes peculiarly appropriate to analyze and consider with great care the position of Mr. Justice REED in this case; and if the instant motion is granted movants will argue and demonstrate to Mr. Justice REED that it is as futile to attempt to prove implied bias on the basis of "circumstances . . . properly brought to the Court's attention which convinces the Court that Government employees would not be suitable jurors in a particular case", as it is to prove actual bias on the part of prospective jurors. For the testimony of Government employees is the main, if not the only evidence (apart from that evidence already before the Court in *Dennis* by way of judicial notice), which could prove the implied bias of the class. The very reasons which make it virtually impossible to show that a Government employee who is a prospective juror may be excluded for actual bias also make it futile to attempt to prove implied bias of the entire class by evidence which must, of necessity, be comprised of the testimony of Government employees. If a Government employee who is a prospective juror may not be relied upon to express actual bias, then Government employees supply no source of evidence from which implied bias of the class can be proven. Consequently the test which Mr. Justice REED would impose is virtually impossible of practical compliance.

Moreover, movants would show to the Court and to Mr. Justice REED that the test suggested by him would allow for the exclusion of Government employees as a class in one prosecution for contempt of the House Committee and yet might permit Government employees as a class to sit in the next prosecution for contempt of the same Com-

* The effect of this division is to create great confusion for it may result in the affirmance of a conviction where the Court of Appeals has sustained a conviction and the affirmance of a reversal where the Court of Appeals has overturned a conviction.

mittee. Such an unequal result, predicated upon different versions of the same objective fact which is more properly the subject matter of judicial notice than that of adversary litigation, should not be encouraged. Accordingly, it has never been required to prove, except by way of deducing reasonable inferences from common experience ascertainable by judicial notice, implied bias of a class; indeed, the doctrine of implied bias assumes the inability to prove bias directly. The novel rule proposed by Mr. Justice REED should be reconsidered.

CONCLUSION

It is respectfully submitted that the motion be granted and that the movants herein be granted leave to file briefs as *amici curiae* upon the petition for rehearing.

Respectfully submitted,

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CHARLES ELMORE COMPTON

Supreme Court of the United States

October Term, 1949

No. 14

EUGENE DENNIS, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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INDEX

PAGE

I	The affirmance rests on no rule of law determined by a majority of the full court or of the participating justices	1
II	Petitioner had no opportunity in the trial court to prove circumstances requiring implication of bias	4
III	The opinion of the court applies an erroneous criterion to the question of whether bias should be implied for government employees.....	6
IV	The opinion of the court misconceives the issues	8
V	The opinion of the court fails to take judicial notice of relevant, noticeable facts.....	11
	Conclusion	17
	Appendix	20

Supreme Court of the United States

October Term, 1949

No. 14

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v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

Eugene Dennis, by his attorneys, petitions for rehearing.

- I. The Affirmance Rests On No Rule of Law Determined by a Majority of the Full Court or of the Participating Justices.

Petitioner's conviction has been affirmed by a vote of five to two. But as we read the opinions, no majority, either of the full Court or of the participating justices, has concluded that petitioner was tried by that fair and

impartial jury which is guaranteed to every accused by the Sixth Amendment. As we read the opinions, moreover, petitioner is to be deprived of his liberty not on the basis of any rule of law, determined by such a majority, but by a division of the Court which neither establishes nor affirms any rule of law.

Mr. Justice Jackson considers petitioner's conviction to be constitutionally unjust, and he has voted to affirm only because the injustice extends beyond petitioner's case. Thus, even without going further—and there is further to go—a majority of the full Court has not decided that government workers may serve on juries which try political offenses. Neither has a majority decided that government workers may serve on juries to try members of minority groups, political or non-political, Communist or non-Communist, which are the scapegoats of a hysteria and hostility engendered by the government and with which government employees may not be associated and retain their jobs. Nor has a majority decided that government-employee juries are legitimate where these circumstances coincide.¹

On this division, and without regard to subdivision, what defendant and what trial judge can estimate what rule is to apply in the next case which falls within these categories? Yet the proclivity of the current administration for the institution of political trials guarantees that next cases are bound to arise—and soon, and in quantity, and in the District of Columbia.

Even now there are pending several cases in this Court which present similar issues. These presumably will be disposed of by a Court augmented by the return of Mr.

¹ We assume that Mr. Justice Jackson will be one of a majority, if it can be mustered, which in any given case limits *Frazier*, even if it will not overrule it. Obviously a defendant should not lose a reversal because the judges disagree merely as to the grounds for reversal.

Justice Douglas. We think this case also should be disposed of by the augmented Court. It is possible otherwise that the issues petitioner has raised will eventually be decided in his favor, but academically only, and while he is in jail. "What then," to quote Mr. Justice Jackson, "becomes of equal justice under law?"

Furthermore, if *Frazier* is to be the one decision of this Court whose principle cannot be limited or qualified, then a rehearing should be granted so that the Court may decide if, under those circumstances, it can tolerate *Frazier*. The opinion of the Court does not re-examine *Frazier* to see if it should be overruled, nor did we argue or brief the question. But if the case must be pushed to all lengths, then it should be reviewed *in toto*.

Mr. Justice Reed concurs in the opinion and judgment of the Court, but reads its decision to mean that a defendant may present to the trial court circumstances which may require it to imply bias in law to government employees as a class. (Of course, a defendant may always produce circumstances to show actual bias of the individual talesman, whether the actual bias derives from employment or anything else.)

The defect found in petitioner's case, then, is that he has made an insufficient factual showing in the record to warrant the conclusion that government employees should have been barred as a class from serving as his jurors, whether or not actual bias appeared as to any challenged talesman. The defect is not that such a showing cannot be made or that it is on an irrelevant subject.

But, we submit, it is more than a little obscure whether this is the basis on which the opinion of the Court rests. For while the opinion places reliance on the inadequacies of the evidence offered to the trial judge, it simultaneously, and contradictorily, states: "A holding of implied bias to disqualify jurors because of their relationship with the

Government is no longer permissible." Further: "We think the rule in *Wood* and *Frazier* should be uniformly applied."

Thus it cannot be said that three justices in addition to Mr. Justice Reed have ruled that evidence is admissible to support a challenge to government employees for implied bias. No trial court can, from this decision, know whether to entertain such evidence or to exclude it because implication of bias for government employment "is no longer permissible" and *Wood* and *Frazier* must be "uniformly applied." Nor can it be said, under the opinion of the Court, whether petitioner has failed to prove his case or whether his case is not permitted to be proved.

II. Petitioner Had No Opportunity in the Trial Court to Prove Circumstances Requiring Implication of Bias.

Petitioner's challenge can be held to fail for lack of an adequate showing to the trial court only if he had an opportunity to make the showing to the trial court. What is more, the trial court must have been willing to consider any such showing as being on a subject relevant to decision. The record demonstrates the contrary in both respects.

The record shows (R₆ 64-65) that the trial judge denied the challenge on the basis that the statutory provision, D. C. Code, sec. 11-1420, eliminated any possibility of disqualifying government employees as a class, and that a challenge to this class for implied bias was no longer available. The trial court rested not on an inadequacy of showing, but on the irrelevancy of any possible showing as to the class rather than as to the individual. The trial court did not even consider on the challenge the allegations of the affidavit in support of the motion for a change of venue. That it considered those allegations in ruling on the venue motion is of no consequence, since that motion

involved different considerations and since the court did not consider the allegations vis-a-vis the challenge.

The record does not bear out the statement in the opinion of the Court that "as far as it appears" the trial court was willing to consider evidence of government investigative practices and the climate of opinion among government employees. The trial court predicated the denial of the challenge on the assumption that the statute eliminated challenges based on government employment. Surely no trial court can be considered willing to receive evidence on a subject it has ruled to be irrelevant.

Accordingly, petitioner was not bound to offer a showing on his challenge. Obviously, one may not be held in neglect for a failure to offer evidence on a subject which the trial court regards as irrelevant.

It now appears from the concurrence of Mr. Justice Reed and from the opinion (in part) of the Court that the statute regarding government-employee juries is not so rigid as the trial court considered it to be, and that its literal text may be overcome by evidence. But if this is the rule, then petitioner should be given the benefit of it. He cannot have had that benefit so long as the trial court did not realize that it was available. He cannot have had it so long as this Court had not yet announced that the statute cannot be literally read and that an accused has a right to demonstrate by evidence that government jurors should be disqualified as a class.

On this ground alone rehearing should be granted and the judgment below reversed. At the very minimum, the case should be remanded for the taking of testimony by the trial court as to whether government employees should be disqualified as a class. Only thus will petitioner be accorded his rights under the rule now announced by the opinion of the Court. Such a remand would be no procedural innovation; it would be nothing more than a direc-

tion that evidence be taken as on a motion for a new trial.

III. The Opinion of the Court Applies an Erroneous Criterion to the Question of Whether Bias Should Be Implied for Government Employees.

"No question of actual bias," states the opinion of the Court, "is before us." But the opinion of the Court then applies to the question which is before it—whether bias should be implied—a test which is appropriate only in determining the question which is not before it.

The opinion of the Court stresses the responses of the talesmen to the interrogatories on voir dire. The opinion states: "We must credit these representations. . . ."

But the responses of talesmen, and whether or not they are to be credited, is relevant only to determining whether actual bias has been shown. Nothing could be more irrelevant to whether bias should be implied. The very theory of implied bias is that disqualification ensues despite all responses of the talesmen, credible or not. If the responses show actual bias, there is no point in getting to any question of implied bias.

There are two basic considerations for the implying of bias for certain classes. One is that in the case of certain relationships it is recognized that there is such a possibility of bias which may be unconscious, that the talesman's assertion of an indifferent attitude cannot be trusted. The other is that certain classes must be disqualified in order to preserve that appearance of impartiality which is essential to the preservation of confidence in our judicial system.

A relative of a party may not serve as a juror, let him assert however convincingly that his verdict will not be influenced by the relationship. The law cannot place confidence in the juror's response under the circumstances,

no matter that it was made in the utmost good faith. Nor can the law have it appear that controversies may be determined in judicial proceedings by those who are kin to one of the parties.

The test used in the opinion of the Court amounts, thus, to a repudiation of all challenges for implied bias. If the juror's response is to be the relevant factor, then a relative of a party may sit, so long as he has responded appropriately. If it is the "state of mind" which is to govern, then all disqualifications for implied bias must go by the board, since they do not depend on "state of mind".

What the opinion of the Court does is to contradict the psychological premise which underlies all rules disqualifying jurors for implied bias. The opinion of the Court states: "... surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." Yet it is exactly the contrary which is held whenever any rule of implied bias is created or applied. And psychology teaches that it is the contrary which is right and the statement of the Court which is wrong. That statement disregards the infinite human capacity for self-deception and rationalization. It ignores the circumstance that one of the last things a person will admit to himself is that he has an irrational prejudice or an even rational timidity. It contradicts the teachings of psychology that men are often not fully aware of their own emotional attitudes.

Precisely because of its erroneous psychological assumption, the opinion of the Court destroys the foundation of all challenges for implied bias. Bias is implied because the law cannot, under certain circumstances, accept the juror's response, not because the juror is less honest than other persons or less well qualified to judge his own attitude. If the logic of the opinion of the Court is to prevail, then relatives of a party and those having a financial interest in the outcome of the litigation cannot be dis-

qualified for implied bias. If they admit a prejudice, they are disqualified for actual bias. If they deny it, their statement must be credited, since they are as honest as the next man and as well-qualified as any to say whether their minds are unbiased.

IV. The Opinion of the Court Misconceives the Issues.

The fact is that the opinion of the Court misconceives our position almost entirely, and with it the issues in the case.

We did not rely solely or principally on the existence of some "miasma of fear". Neither did we ask preferential treatment for Communists; we could not have been so naive.

Our position is this:

(1) First, every accused, and not just Communists, should be given a fair and impartial jury as contemplated by the Sixth Amendment. No other rule can infringe this one even for the sake of uniform application of that other rule. Indeed, we do not understand the opinion of the Court, which on the one hand declares that the rule of *Frazier* and *Wood* must be uniformly applied, and on the other declares that "for the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

(2) In the implementation of the requirement of the Sixth Amendment, a government employee should not be permitted to serve as a juror in any criminal case, regardless of his responses on voir dire. If he did not press this contention before it was because we thought that petitioner's case did not require going so far. Besides, we thought that *Frazier* was not ripe for overruling. The application which has now been given it makes it over-ripe.

(3) Even if government employees may serve as jurors in ordinary criminal cases, they should not be permitted to serve in prosecutions for political offenses, that is, where "the Government's interest is the vindication of a direct affront, as distinguished from its role in an ordinary prosecution." Such a rule would not apply to Communists only, but to Republicans, Democrats, and anybody else involved in a prosecution for contempt of Congress or other political offense.

(4) As an independent ground, bias should be implied to government employees whenever the accused is a member of a group which is governmentally stigmatized as "disloyal" which is the object of a hysteria largely engendered by the Government and membership in which or association with which results in disqualification for government service on grounds of "disloyalty". Particularly should bias be implied when the prosecution of such an accused is for a political offense. Such a rule does not discriminate in favor of Communists. It merely recognizes that there is a discrimination against them, in order to apply realistically the one uniform rule which is mandatory—that the accused shall have a fair and impartial jury. Furthermore, the rule should also apply to defendants who are members of non-Communist and anti-Communist organizations which have been declared "subversive" by the government. Mr. Justice Jackson's dissent, like the opinion of the Court, oversimplifies the issues in this regard. Perhaps the administration is hostile to Republicans as well as to Communists, but there is a controlling difference of kind and degree of hostility. If a Republican is on trial for contempt of Congress, he may find that government employees serving on the jury are themselves Republicans or "sympathetically associate" with Republicans. But a Communist cannot find that government-employee jurors are themselves Communists or sympathetically associate with Communists.

The issues presented in the above summary have not been treated by the opinion of the Court. The opinion does not, thus, consider whether in a political prosecution it is reasonable to suppose that government employees may be predisposed, subconsciously or otherwise, in favor of the interests of their employer. It does not consider whether, in such a prosecution, it is unseemly for employees of the government to serve as jurors. It does not consider how the service of government employees as jurors in such cases squares with the historic function of juries—to be a buffer for an accused against political reprisal of his sovereign. In fact, the opinion of the Court does not consider this contention at all, but merely gives it a bare mention before going on to the contention on which, it is said, “petitioner primarily bases his case”. We had no intention of making secondary to anything our contention that government employees may not serve as jurors in prosecutions for political offenses. And if it were a secondary contention, nevertheless it deserved to be dealt with.

Even on the issue considered to be the primary basis of our case the opinion of the Court draws the lines far too narrowly. The opinion of the Court refuses to find that government employees are affected by a miasma of fear because of the Loyalty Order. But the issue goes beyond fear and beyond the Loyalty Order.

Government employees should be disqualified from serving in cases such as petitioner’s not merely because fear may affect their verdict—and such fear exists—but because an entire state of mind, incompatible with reaching an impersonal verdict in such cases, has been engendered in government employees. Fear is only part of this state of mind. The discipline which government employees are under, the expressed sentiments of their superiors in office, the attitudes of their associates, the governmental policies they effectuate—all these tend to create a pre-

disposition, perhaps wholly subconscious, which prevents them from being, and from seeming to be, fair jurors in a political trial of the General Secretary of the Communist Party. A man who in his daily work must be officially and personally anti-Communist is not an appropriate juror for a Communist defendant charged with an offense touching the security of the state.

As to the element of fear, this does not, as the opinion of the Court supposes, arise merely from the Loyalty Order, nor does it concern only job tenure. Were there no Loyalty Order a government employee would have cause to be wary of the witch hunts of the Committee on Un-American Activities, to name only one governmental agency. Nor was the bill of attainder against Lovett, Watson and Dodd (328 U. S. 303) a product of the Loyalty Order. A government employee who is accused of being pro-Communist not only has his job in jeopardy, but may find that he and his family are the objects of social ostracism and indignities. This has been the experience of State Department employees who are currently under attack by Senator McCarthy. Their testimony to that effect, widely reported in the press, is incorporated in official hearings, which have not yet been published.²

V. The Opinion of the Court Fails to Take Judicial Notice of Relevant, Noticeable Facts.

Rehearing should be granted because the Court has failed to take judicial notice of facts which are relevant and noticeable and which can take the place of the "vague conjecture" which the opinion of the Court refuses to make.

² The owner of a private business in Washington was similarly subjected to extreme indignities and economic pressure following her "investigation" in a hearing of the Committee on Un-American Activities. She was finally driven out of business. See Hobbs, *The Subversive Drugstore*, *The Nation*, November 26, 1949.

The opinion of the Court indicates two areas of relevancy for the purposes of introduction of proof. Obviously the same areas must be available for the purposes of judicial notice, a process which takes the place of the production of proof.

A.

The first of these areas includes "any evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal."

Government investigating agencies do not, of course, make their files available. They refuse them even to Congressional subpoena. Noticeable information as to their practices is, therefore, scant. Nevertheless, it exists and on the point at issue is fully persuasive.

The record of *United States v. Judith Coplon*, District Court, District of Columbia, No. 381-49, contains some 800 transcript pages of official investigative reports of the Federal Bureau of Investigation in the field of "internal security". These reports received extensive publicity at the time they were put into evidence. They are the basis of a report of the National Lawyers Guild, which was publicly released in January 1950, when a copy was transmitted to the President. *Report of the Special Committee of the National Lawyers Guild Appointed to Study Certain Alleged Practices of the FBI*. Both the investigative reports which appear in the *Coplon* record and the Guild report are proper subjects of judicial notice.

The *Coplon* reports record investigations of "loyalty" of individuals along the lines of "loyalty" investigations of government employees. They demonstrate that in these

* To document this assertion and subsequent references to the comprehensive nature of the F. B. I.'s criteria of "loyalty," we quote in the Appendix to this brief several excerpts from the National Lawyers Guild Report.

"loyalty" investigations the FBI takes cognizance of activities and associations which are as lawful as a vote of acquittal and which indicate no greater affinity for Communism than a vote of acquittal for the General Secretary of the Communist Party. Particularly revealing, for present purposes, is a passage in a report of the FBI investigation of two well known actors, Frederic March and his wife, Florence Eldridge March. This report includes the following information, collected by the FBI on its own initiative and not merely recorded as something volunteered to it by an outsider.

The New York 'Times' newspaper, June 26, 1947, carries an item bearing a Washington, D. C. dateline, which reflects that Frederic March and his wife, Florence Eldridge, led a parade of witnesses for the defense in the mass trial of 16 members of 'an alleged Communist front organization' for contempt of Congress. Instant article stated that the stage couple testified in court to the excellent reputation of Herman Shumlin of the Joint Anti-Fascist Refugee Committee, one of the accused. (*Coplon trial*, stenographic transcript, pp. 5244-5255. Also quoted in *Guild Report*, Appendix B, p. 4.)

Thus in 1947, the year when petitioner was tried, the FBI took cognizance, as relevant to the "loyalty" of two individuals (whose "loyalty" it had no business investigating), that they testified in a political trial in the District of Columbia. Their testimony concerned not the General Secretary of the Communist Party, but the reputation of a theatre producer, a well-known capitalist. Their act of testifying was every bit as much a part of the judicial process as a juror's act in voting to convict or acquit. And a juror who votes to acquit renders an accused a much greater service than a character witness.

From the sole source of available illumination, it appears that the F. B. I. applies in its "loyalty" investigations approximately the same criteria of "loyalty" as those of the Committee on Un-American Activities, described in our

principal brief. It seems plain that an F. B. I. agent would be guilty of a gross dereliction of duty if he failed to take cognizance of a government employee's vote for the acquittal of the General Secretary of the Communist Party.

Furthermore, the Committee on Un-American Activities is itself a government investigatory agency. In the light of what is known about the Committee's standards, some of which are referred to in our principal brief, there can be no rational doubt that it would take cognizance of such a vote for acquittal. Moreover, the files of the Committee are open to and freely used by the various agencies of the executive branch. Thus the latest annual report of the Committee discloses that last year agents of executive agencies made 3,956 visits to the Committee's files section to obtain information concerning more than half a million individuals. (*Annual Report of the Committee on Un-American Activities for the Year 1949* (March 15, 1950), p. 21.) The Committee also supplied to members of Congress data on the "subversive" affiliations of 2,473 persons, as well as 597 reports on the nature of various organizations (*Id.*, p. 20). Indeed, Part I, section 3 of the Loyalty Order requires that loyalty investigations shall include reference to files of the Committee. It is particularly significant for present purposes that the investigators of the executive branch consult Committee files with respect to the exercise of the franchise: "... the committee has made available a large, completely indexed, and readily accessible reference collection of lists of signers of Communist Party election petitions, which is consulted daily by investigators from various Government agencies as well as staff members" (*Id.*, p. 19).

B.

The second area of relevancy indicated by the opinion of the Court includes "evidence with respect to the existence of a climate of opinion among Government employees

that they would jeopardize their tenure or provoke investigation by such a verdict."

No survey of opinion of government employees on this subject is, so far as we know, available. If it were, it would not be reliable. An intimidated government employee can hardly be expected to admit that he is intimidated, particularly since the admission might well bring about the very consequence he is afraid of. We did, however, refer in our principal brief to the conclusions of competent observers of the Washington scene. What is more, episodes occur in Washington which can only be the product of fear on the part of government employees, as in the eruption over the Shura Lewis speech in a Washington school (Brief, pp. 47-48).⁴

Beyond this, the most convincing evidence that government employees would consider a vote for acquittal a perilous action is that all facts demonstrate that such an opinion would be well warranted. A government employee has merely to read the papers to see how little it takes to jeopardize an employee's tenure when questions of Communism are involved. Let the Secretary of State merely express sympathy for the plight of his old friend, Alger Hiss, and the next day the Secretary's fitness to hold office is under savage attack and his dismissal is rumored. Let a government employee participate in the framing of foreign policy which is thereafter considered to have failed, and he is immediately accused of being a tool or dupe of the Kremlin.

⁴ This episode also illustrates how particularly unreliable is subjective evaluation of a mental state which arises from a complexity of fear and political opinion. Obviously the irrational actions of the school authorities and others were the product of a cold war neurosis. Yet those who so acted claimed, no doubt in all good faith, that they were concerned with protecting the morals of the youth from being corrupted. A similar rationalization led to the condemnation of Socrates in an ancient political trial.

The opinion of the Court fails to take into account the real facts of the Washington scene. It appears to find it incredible that government employees should cringe before their superiors. But what it ignores is that government employees cringe, and certainly have every reason for cringing, not so much before their superiors as before their superiors' cringing before Congress. Let the Committee on Un-American Activities persistently charge that the executive branch is full of Communists, and a full-fledged "loyalty" program is developed and applied by the executive. Let a Senator make accusations on the floor, no matter how vague and unsubstantiated, and those he has mentioned are summoned from the four corners of the earth, be their rank as elevated as that of Ambassador.

What every Washington observer realizes is that government employees must be wary not of the "loyalty" standards of their superiors in the executive branch, but of the "loyalty" standards of whoever happens to be at the moment the most recklessly outspoken member of Congress. That a vote for acquittal of the General Secretary of the Communist Party would be something every member of Congress would pass off with indifference is not to be thought of, particularly where the case is one for contempt of Congress and Congressmen testified for the prosecution.

Furthermore, the government employee who is called upon to vote as a juror is conditioned not only by the general environment but by his knowledge of his own background. Perhaps he would not be afraid to vote to acquit Eugene Dennis if that were the sole factor relevant to his "disloyalty." But suppose that sometime in his life he had belonged to an organization to the left of the Kiwanis Club, or had given money to the cause of the Spanish Loyalists, or had known a Russian, or had worked in certain sections of the State Department? He could not then be so imperturbable.

Moreover, government employees, especially if they have some such element in their background as those described, are virtually compelled, if they wish to keep their jobs, to declare that they are anti-Communist, not merely non-Communist. There is a precedent for holding that an accused may be tried in a political prosecution by a jury composed of his avowed political enemies, but coming as it does from Lord Braxfield's notorious court, it is not a palatable one. *Trial of Thomas Mair*, 23 How. St. Tr. 117 (1793).

Nor will it do to suggest that others are under the same pressures as government employees. Others too are in vulnerable positions, but not all others. Yet every government employee, from a charwoman to a cabinet officer, is vulnerable. There is no better game than a government employee, for whatever he is blamed for becomes the fault of the administration of an opposing political party.

These are the realities of life in Washington today. Everybody knows them. They are not conjectured. We do not understand how they can be ignored.

CONCLUSION

Trial by jury was won in Magna Charta as a measure of protection against the sovereign. This function of the jury is now overturned by the opinion of the Court. Government juries afford an accused in a political trial no other comfort than judges appointed by the king and holding office at his sufferance. The Court's opinion thus presses further the noticeable gradual relegation of juries to a position as an arm of the administrative bureaucracy rather than as a barrier against injustices attempted by that bureaucracy.

We do not believe that the Court which decided *Wood* had any notion that the path down which it was starting

would lead to any such destination. We do not believe that the *Wood* Court would have sustained government-employee juries in a case like the present. Yet from *Wood* through *Frazier* to *Dennis* there has been a progression which vitiates the right of jury trial. This progression has abandoned primary principles for the sake of extending the reach of a decision which was originally questionable.

What is more, the result so reached by the present decision is based not on the issues which are involved or on the realities which all can see, but on abstractions which are not involved. Yet the protection of constitutional liberties, particularly vital in a time of political stress, requires that this Court meet issues which involve these liberties directly and realistically.

Petitioner's case presented to the Court important legal questions which touch the very heart of our society—the fair administration of justice. These issues are left dangling by the division of the Court. The opinion of the Court is obscured by internal contradictions. Petitioner is denied relief for failing to make a showing although only by the present decision does it appear that he was entitled to make the showing. To the question before it the opinion of the Court applies a criterion which is appropriate only for a question not before it and which destroys all challenges for implied bias. The opinion of the Court fails to deal with the issues which are present and misconceives the position of the petitioner. While repulsing conjecture, the opinion of the Court itself ignores judicially noticeable facts and realities of which every one is aware.

If ever a case clamored for rehearing, this one is it.

Respectfully submitted,

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Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I certify that the within and foregoing petition for rehearing is presented in good faith and not for delay.

George W. Crockett, Jr.

APPENDIX

Excerpts from Report of the Special Committee of the National Lawyers Guild Appointed to Study Certain Alleged Practices of the FBI:

In short, the FBI, as the Coplon reports reveal, is conducting a program of 'loyalty' investigations of persons who, as in the case of the subjects of the Coplon reports, are not government employees or applicants for government employment. The reports themselves are dossiers on the 'loyalty' of the subjects, that is, on their views and associations. What is more, they amply demonstrate that the FBI collects data and keeps files on the 'loyalty' of many individuals other than those who are the subjects of the Coplon reports.

. . .

It is worth noting that the FBI 'loyalty' program for private individuals preceded the full-scale 'loyalty' program for federal employees, which got under way late in 1947. (P. 6).

. . .

One of the more publicized items in the Coplon reports was the solemn statement that a certain young lady in Washington made a date with a man to go to Baltimore to buy some Polish sausage from a Polish butcher. If this information had been furnished to the FBI by some volunteer, one might deplore the existence of cranks in this world and not criticize the FBI, except, perhaps, for an over-zealous red tape which causes its staff to record every complaint, no matter how trivial. But the situation is different when it is realized that this information was obtained by the FBI's own efforts in tapping the young lady's phone, and that the message so intercepted was only one of numerous messages of like nature which the FBI considered sufficiently important to perpetuate in a formal report. (P. 3).

. . .

Some of the FBI's criteria of loyalty have already been indicated in this text, in connection with the

'reasons' which caused the institution of investigations. For present purposes it will suffice to list the following as an additional small sampling of items to which the Coplon reports obviously attach significance.

Being affiliated with the Progressive Party. (Reports 1, 3, 8, 9, 12, 14, 24.)

Admiring the military feats of the Russian Army during World War II. (Reports 12, 28).

Acting (in 1945) in a skit about the battles of Leningrad and Stalingrad. (Report 1).

Opposing the Committee on Un-American Activities. (Report 1).

Writing a master's thesis on the New Deal in New Zealand. (Report 2).

Attending a rally against the Mundt Bill (Report 3).

Having an "extremely friendly attitude" towards Russia. (Report 1).

Having "pro-Soviet" sympathies. (Report 12).

Doing work for Russian War Relief. (Report 24).

Advocating aid to Russia in 1941 and 1942. (Reports 9, 24).

Giving money for Spaniards exiled in France. (Report 24).

Writing 'subtle Russian propaganda in a Jewish newspaper.' (Report 13).

Writing a book about Russia 'which is written from a Russian propaganda viewpoint and presents Russia in a favorable light.' (Report 23).

Having in one's library: 'I Choose Freedom' by Kravchenko and 'The Coming Crisis'. (Report 27).

Possessing considerable literature on B'nai Brith and the American Council of Jewish Women. (Report 27).

Being 'a pro-Soviet playwright who visited the U. S. S. R. in 1945' (Report 27). In the case of a newspaper, 'reflecting pro-Soviet policy'. (Report 9).

Supporting the War Department's policy (in 1945) of not refusing army commissions on account of recipients' opinions. (Report 1).

Making a recording of Langston Hughes' 'Freedom Plow.' (Report 1).

Taking courses under Veblen. (Report 12).

Making 'a strong, progressive speech', which attacked an anti-semitic teacher, 'called upon the American women to fight for the Wagner-Murray-Dingell Bill and complained that the German invaders destroyed some 80,000 schools in the Soviet Union and other countries which had been under German occupation.' (Report 1).

Being the maternal aunt of the Chairman of the Friends of Free Germany. (Report 13).

Writing a book about an heroic Russian woman. (Report 23).

The reports also indicate a propensity to list or look for the union memberships of persons referred to (Reports 6, 10, 11, 13, 14, 17), including one case (Report 10) in which FBI 'indices' apparently carried the names of 60 employees who had signed up in a union organizing drive. The reports also contain indications of anti-Negro and anti-Semitic prejudices.

One of the most psychopathic features of the loyalty-determining process in the Coplon reports is the solemn assessment of the 'loyalty' to the United States of persons who owe their loyalty not to the United States, but to other countries of which they are citizens. Thus one of the reports (Report 26) considers it important to note of a Yugoslav citizen, who came to Chicago from Belgrade to work in the Yugoslav consulate, that he is probably a member of the Yugoslav Communist Party, and that he 'is very anti-American in his political views and always favors Russia and Yugoslavia in all questions pertaining to problems arising between Russia, Yugoslavia, and the United States.' Another report (Report 23) comments as follows of a Russian-born author who writes in the Russian language and is a citizen of Yugoslavia: 'Her comments in personal correspondence shows her continued allegiance to the 'New Yugoslavia' and her apparent lack of loyalty to the U. S.' A third report (Report 9) considers it necessary to observe that Metropolitan Gregory, Patriarch of Moscow, 'has been reported to be ardently pro-Soviet.' (pp. 6-8; footnote references have been omitted.)